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Supreme Court of the United States

OFFICE OF THE CLERK

THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen,

Petitioners,

v.

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; and UIH ASIA INVESTMENT CO., a Colorado general partnership,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

APPENDIX TO PETITION FOR WRIT OF CERTIORARI (VOLUME ONE OF TWO)

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APPENDIX A

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT GRANTING DEFENDANTS-APPELLANTS' MOTION FOR A STAY OF MANDATE, FILED JUNE 20, 2000

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; UIH ASIA INVESTMENT COMPANY, a Colorado general partnership,

Plaintiffs - Appellees,

v.

THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; WHARF CABLE LIMITED, a Hong Kong company; STEPHEN NG, a Hong Kong citizen,

Defendants - Appellants.

PRODUCT LIABILITY ADVISORY COUNCIL, INC.,

Amicus Curiae.

Nos. 97-1421 and 98-1002

ORDER

Filed June 20, 2000

Before **BRORBY, HOLLOWAY,** and **BRISCOE,** Circuit Judges.

Appellants' motion to stay the mandate pending the filing of a petition for a writ of certiorari in the Supreme Court is granted.

Issuance of the mandate is stayed until September 5, 2000. If a notice from the Supreme Court clerk is filed with this court during the stay period indicating that appellants have filed a petition for certiorari, the stay continues until the Supreme Court's final disposition.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Kathleen M. Fabrizio
Deputy Clerk

APPENDIX B

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT, FILED APRIL 28, 2000

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; and UIH Asia Investment Company, a Colorado general partnership, Plaintiffs-Appellees,

v.

The WHARF (HOLDINGS) LIMITED, a Hong Kong company; Wharf Communications Investments Limited, a Hong Kong company; Wharf Cable Limited, a Hong Kong company; and Stephen Ng, a Hong Kong citizen, Defendants-Appellants.

Product Liability Advisory Council, Inc., Amicus Curiae.

Nos. 97-1421, 98-1002.

United States Court of Appeals
Tenth Circuit

April 28, 2000.

Before BRORBY, HOLLOWAY, and BRISCOE, Circuit Judges.

BRISCOE, Circuit Judge.

This case arises out of the award to defendant The Wharf (Holdings) Limited (Wharf) of a franchise to operate Cable Network Communications Limited (CNCL), a cable television system in Hong Kong. United International Holdings, Inc., (UIH) initiated this action against Wharf and one of its managing directors, Stephen Ng, claiming UIH had acquired an option to acquire 10% of the stock of CNCL and had been precluded from exercising its option. UIH asserted claims under Section 10(b) of the Securities Exchange Act of 1934, the Colorado Securities Act, and Colorado common law. Following an eleven-week trial, a jury found in favor of UIH and awarded $67,000,000 in compensatory damages and

$58,500,000 in punitive damages. The district court awarded $28,208,440 in prejudgment interest. During post-judgment proceedings, the district court held Wharf in contempt of court for failure to comply with the court's turnover order, sanctioned Wharf in the amount of $944,233.10, and awarded UIH post-judgment attorney fees of $144,457.91. Wharf appeals and we affirm.

I.

Background

The government of Hong Kong publicized its intent to grant an exclusive license for operation of a cable television system in Hong Kong in 1991. Wharf had little experience in the cable industry and directed Ng to locate suitable business partners with telecommunications and cable television experience. Ng initiated discussions with NYNEX Network Systems Company (N.Y.NEX) representative Paul Duffy, who agreed that NYNEX would review the telecommunications portion of Wharf's proposal. NYNEX had technical and business expertise in the cable television industry, particularly in relation to the design, installation, and maintenance of subscription television networks. NYNEX devoted its resources to this early phase of the project with the tacit understanding that if Wharf received the award and both Wharf and NYNEX were comfortable with the relationship and the project, NYNEX would have an opportunity to invest in the communications company or possibly garner an operations and maintenance contract for its efforts.

Mark Schneider, vice president of UIH, met with Ng in early 1991. UIH is based in Denver, Colorado, and owns, operates, and invests in worldwide cable television systems. UIH representatives made it clear they were not interested in serving as a consultant on the project for a fee, but would commit their resources in exchange for a right to invest in CNCL if Wharf was awarded the license. Ng wrote to William Hudon of UIH on July 20, 1991, stating: "If as a result of our

discussions you continue to be interested in co-investing in Wharf Cable's project in Hong Kong . . . I would appreciate hearing from you very soon." Appellants' Addendum at 31. In response to UIH overtures that it was interested in obtaining a greater ownership interest, Ng added: "Under the present rules in Hong Kong governing television franchises, a foreign company is not permitted to own more than 10% in the cable operator." *Id.* In October 1991, Schneider signed a confidentiality agreement on behalf of UIH, prohibiting UIH from divulging confidential and proprietary information provided by Wharf.

Ng and Schneider met in Singapore in June 1992 and Ng informed Schneider that Wharf had selected UIH as its cable partner. Ng also mentioned that Wharf was engaged in serious negotiations with NYNEX regarding a telephone partnership. According to Schneider, Ng did not expressly state that NYNEX's involvement was a prerequisite to any deal between UIH and Wharf. Schneider recalled that Ng offered UIH a 10% ownership interest in CNCL. Schneider returned to Denver and sent a memo to the chair of the UIH board, stating: "It looks like we are in for 10% of the Hong Kong project." *Id.* at 34.

Beginning in August 1992, several UIH employees, at UIH's expense, went to Hong Kong to assist Wharf in crafting the cable proposal, negotiating key contracts, designing the cable system, recruiting potential employees, and arranging financing. Hudon, UIH's financial specialist, contacted banks and other funding sources regarding UIH's 10% contribution obligation which would be triggered if UIH exercised its option.

UIH and Wharf drafted several letters of intent and shareholders' agreements. The initial letter of intent drafted by Wharf and submitted to UIH in early August recognized the "intention of the parties to cooperate together and invest in" the cable company for the purpose of preparing and submitting the license application and, hopefully, constructing, operating, and

managing the cable television network. *Id.* at 43. Under the heading "Corporate Structure and Shareholdings," the draft provided that UIH would hold 10% of the company's share capital. *Id.* However, the draft letter provided: "This letter does not create legally binding and enforceable obligations and is intended to identify in general terms a number of the principal matters forming the basis of the cooperation between the parties." *Id.* The letter concluded: "Each of the parties will negotiate in good faith, and use all reasonable endeavors to conclude the terms of a formal, legally binding shareholders' agreement between them by not later than Friday 25th September, 1992." *Id.* at 46-47. Sonjia Norman, UIH's Hong Kong counsel, responded to this draft letter by advising UIH:

> "Our signing of the full Shareholder's Agreement after this letter of intent should be conditional upon: (a) our approval of the financial, operating and programming plans; (b) board consent on both sides; (c) award of the local franchise; (d) the subscription of NYNEX of 20% of Wharf Cable. (Mike [Fries, senior vice president of UIH], is this still our concern?)"

Id. at 48. The parties never signed a letter of intent.

Schneider went to Hong Kong in September 1992 during Wharf's final bid preparations. Ng expressed concern that NYNEX might withdraw and deal Wharf's chances a critical blow, and that UIH's unimpressive balance sheet would make Wharf's bid less attractive. Schneider offered to discuss UIH's financial status with Wharf's board and specifically inquired as to Ng's authority to "make this deal" on behalf of Wharf. At trial, Schneider testified that Ng expressed full authority to offer UIH a 10% right of investment, but no more. The parties were unable to consummate a shareholders' agreement before the deadline for the license application.

As the bid date came nearer, Wharf was increasingly uncomfortable with the lack of a signed letter of intent or a signed shareholders' agreement and the perceived weaknesses

of its proposal. To demonstrate it had secured sufficient technical expertise to construct and operate the system, Wharf entered into separate Technical Cooperation Agreements with NYNEX and UIH on September 25, 1992. The UIH agreement obligated UIH to do nothing until Wharf was awarded the license. The agreement acknowledged that Wharf "wishes to obtain the benefit of UIH's experience, and to engage UIH for the purpose of receiving assistance with respect to the administrative and technical operations of the subscription television system." *Id.* at 149. The agreement listed UIH's qualifications and duties with respect to construction and operation of the system, described UIH as "an independent contractor," and specified "UIH shall have no right or interest in the Company or in the CATV System, nor any claim or lien with respect thereto, arising out of this Agreement or the performance of its services hereunder." *Id.* at 156. The agreement specifically provided: "Notice of termination, changes and additions to this Agreement as well as any additional or supplemental agreements to this Agreement must be made in writing. Additional oral agreements are invalid. The requirement to use the written form may be waived only in writing." *Id.* at 160. Michael Fries, senior vice president of UIH, signed the Technical Cooperation Agreement on behalf of UIH. This is the only agreement that was signed by the parties during the course of their relationship. According to UIH, the agreement was simply a tool used to support Wharf's bid for the cable project. Fries, UIH's primary negotiator, specifically deleted a section providing that the agreement "supersedes and invalidates all commitments, representations, warranties and other agreements relating to the subject matter hereof, . . . either orally or in writing prior to or contemporaneously with the date hereof." Appellees' Suppl. App. at 428. Fries characterized the agreement as part of a last minute filing strategy. He claimed Emil Fung, who was heavily involved in negotiations on behalf of Wharf, promised that notwithstanding the Technical Cooperation Agreement, the submitted bid would clearly identify UIH's right to invest.

Fries testified at trial that he made it clear that UIH would not agree to the proposed Technical Cooperation Agreement approach without inclusion in the bid document of UIH's right to invest. UIH introduced a draft bid at trial that stated: "Wharf, as the 100% owner, has offered options to NYNEX and UIH to purchase up to 30% of the shares in CNCL." *Id.* at 403. Schneider authorized Fries to sign the Technical Cooperation Agreement after Fries viewed this draft bid. Fung testified at trial that UIH representatives were shown the final license application before it was submitted and did not object to its content.

On September 30, 1992, Wharf submitted the license application in its own name. The bid document contemplated "initial sole ownership and Board control by The Wharf (Holdings) Limited coupled with the technical cable expertise and experience of its two technical partners, NYNEX Network Systems Company and United International Holdings, Inc." Appellants' Addendum at 191. Under the heading, "Ownership Structure," the bid provided: "If Wharf Cable is successful in its license application, Wharf will consider the introduction at the appropriate time of NYNEX, UIH and other strategic partners as co-investors to purchase up to 40% of the shares in CNCL." *Id.* at 196. UIH officials were concerned by the "noncommittal" language used by Wharf in the bid. According to Schneider, Ng promised to resolve any problems when the parties met in Denver in October.

At a meeting on October 8, 1992, Ng allegedly requested that UIH continue to provide high level UIH employees until Wharf could hire suitable permanent employees. UIH officials agreed to comply with this request if UIH's investment right in CNCL was "absolutely firm." Ng allegedly agreed that in exchange for UIH's commitment to the project and continuing technical and support service, Wharf would grant UIH an option to invest. The alleged terms of the right to invest were: (1) UIH had an option to purchase 10% of CNCL's stock; (2) UIH's option purchase price was 10% of the equity capital

required to fund the project, less UIH's expenses and the value of UIH's previous services; (3) UIH's option was exercisable only if UIH demonstrated its ability to fund for 18 months its portion of the project's equity capital requirements; and (4) the option expired if not exercised by UIH within six months after Wharf received the franchise. This agreement was not put in writing and, at trial, Ng denied granting UIH a 10% option. Shortly after the meeting, UIH officials went to Hong Kong and Ng introduced UIH as Wharf's "strategic partner." In addition, Ng allegedly accompanied UIH officials to at least one bank meeting where the subject was UIH's attempt to raise money to invest in the cable company.

In October and November, Wharf and UIH exchanged three different drafts of proposed shareholders' agreements. The drafts all contained the following clause:

> This Agreement supersedes and invalidates all commitments, representations, warranties and other agreements relating to the subject matter hereof which may have been made by the Shareholders either orally or in writing prior to or contemporaneously with the date hereof, and which, if any exist, shall now become invalid from the date this Agreement becomes effective.

Id. at 252, 306, 388. Wharf and UIH could not reach an agreement on any of the drafts and they all remained unsigned.

In late December 1992, NYNEX informed Ng it was having difficulties "with the internal sale of this opportunity," and would "again examine the opportunity for investment" at service launch. *Id.* at 383. Ng disclosed NYNEX's tentative withdrawal to Schneider on January 14, 1993, and suggested that Wharf and UIH "defer ownership discussions but [Schneider] wanted to leave the door open ... [and] talk to [Ng] in London at the end of next week." *Id.* at 394. After the London meeting, Schneider informed Ng that UIH "would like to discuss having a stake in the venture in the 25% range provided that NYNEX is not going to participate in the

business as an investor." Appellees' Suppl. App. at 610. Ng responded that "given the NYNEX situation, we should put ownership issues on hold until after service launch." Appellants' Addendum at 396.

UIH filed its Form S-1 Registration Statement with the Securities and Exchange Commission on April 21, 1993. The statement disclosed UIH's current and potential investments, and stated that upon award of the franchise to Wharf, UIH "will be entitled to acquire a minimum of 10% of the equity in Wharf Cable, with Wharf Holdings maintaining the remaining portion." *Id.* at 619. UIH and Wharf continued their discussions throughout the spring of 1993, but were unable to reduce an agreement to writing. This prompted Fries to submit a proposed "Memorandum of Understanding" to Wharf stating that acquisition of the shares of CNCL by UIH "is conditioned upon approval by both UIH and Wharf of" several documents, including "the terms of the Shareholders' Agreement," *Id.* at 401. This initial draft of the "Memorandum of Understanding" designated that, subject to the stated conditions, "UIH shall notify Wharf in writing of its intent to acquire" up to 20% of the shares of CNCL. *Id.* The final version stated "UIH will acquire a[10%] ownership interest in CNCL." *Id.* at 623. The percentage of UIH's potential ownership interest ranged from "up to 20% but not less than 10%," *id.* at 409, to 15%, and in the final version 10%. As with the letters of intent and the shareholders' agreements, the parties never signed any version of the Memorandum of Understanding.

On May 27, 1993, the Broadcasting Authority of the Hong Kong government awarded the franchise license to Wharf, effective June 1, 1993. UIH conducted a public offering and raised approximately $66,000,000 for its initial investment in CNCL. In late July or early August, UIH informed Ng it had satisfied the conditions of its option agreement and was ready to exercise its option.

Discussions regarding UIH's claimed right of investment were occurring inside Wharf. On August 11, 1993, Fung addressed a memorandum to Ng evaluating the "pros and cons of minority (10%) equity participation by United International Holdings in CNCL/Wharf Cable." Appellees' Suppl. App. at 700. He recommended "structuring a 10% UIH investment" in recognition of the "'sweat-equity' contributed by UIH in [Wharf Cable's] nascent beginnings." *Id.* at 701. Fung authored another memorandum to Ng on September 1 expressing that "a partnership with UIH can be of strategic benefit to Wharf Cable," and reiterating that UIH's contribution "was made in the spirit of entrepreneurial partnership and justifies a form of compensation commensurate with the expected upside of the Wharf Cable project." *Id.* at 885. Ng approached the Wharf board in early September to discuss UIH's investment in CNCL. On September 9, Ng reported to Fung: "Didn't get very far with the Chairman! More interested in a telecom partner! How do we get out?" *Id.* at 887.

Schneider and Ng continued to correspond in September and October. According to Schneider, Ng hinted for the first time that a deal might not be forthcoming without a telephone partner. Schneider pressed Ng for completion of the memorandum of understanding and stressed that "[o]ur deal was never to seek compensation but to be a 10-20% investor in the project. This was our agreement from the very beginning." *Id.* at 888. Ng advised Schneider that "[y]ou were made aware early on that board approval was necessary on our side. You were also made aware at the time NYNEX made the decision at the end of last year, that firstly we would need to find a new basis, and that secondly, my board directed we should focus on station launch." Appellants' App. at 3237-38

Schneider and Fries traveled to Hong Kong for Wharf's station launch on October 31. While there, they explained to Wharf's board chairman UIH's contribution to the cable project and UIH's concomitant right of investment. According to

Schneider, the chairman looked surprised. After the meeting, Ng urged Schneider to be patient.

On November 5, 1993, UIH submitted its final draft memorandum of understanding to Wharf, which stated that "UIH's investment in CNCL is conditioned upon the approval of the board of UIH and WCIL." Appellants' Addendum at 623. Schneider also addressed a letter to Ng, stating: "As you and I have discussed, UIH has an expectation and desire to invest not less than 10% in the Wharf Cable project. This has been our intent from the very beginning and has been reconfirmed by both of us throughout our relationship." *Id.* at 620.

UIH prepared another S-1 statement in early November. After discussions between UIH and Wharf concerning language to describe the parties' relationship, UIH settled on the following:

> [UIH] continues to pursue its opportunity to acquire through UIH Asia a 10% interest in Wharf Cable Limited and its affiliated programming company.... [UIH] is currently negotiating the acquisition of the 10% interest in Wharf Cable.... [UIH] anticipates that the terms of this investment will be finalized during the first three months of 1994; however, there can be no assurance that the Company will *acquire an interest* in Wharf Cable.

Id. at 631. A December 11 internal Wharf note regarding the S-1 states that the

> proper legal disclaimers have been inserted in the language so as to not bind us to UIH's representation which speaks to an "opportunity" to acquire a 10% interest in Wharf Cable. Our next move should be to claim that our directors got quite *upset* over these representations and have therefore instructed us to "settle up" on the [technical cooperation agreement] only. Publicly, we *do not* acknowledge the opportunity and speak only to UIH's

> involvement vis a vis the [Technical Cooperation Agreement].

Appellees' Suppl. App. at 925 (emphasis in original). Similarly, in a November 24 document entitled "Bi-Weekly Meeting with Chairman" under the topic "UIH," the following notations were made: "start to back pedal" and "Activate TAC [Technical Cooperation Agreement]." *Id.* at 926

On December 1, 1993, Ng conveyed to Schneider that the Wharf board was divided over UIH's participation and the matter was "unlikely to be resolved ... in the near term" *Id.* at 928. A memo prepared by Ng to the Wharf board indicated that Ng "[e]ncouraged [UIH] to activate" the Technical Cooperation Agreement, "but they were careful not to take the bait." *Id.* Schneider wrote a letter to Ng stating UIH would be "happy" to accept payment under the Technical Cooperation Agreement provided UIH was not "in any way prejudicing our position that we have been working under the expectation of an investment into Wharf Cable." *Id.* at 931. Scribbled in the margin of Ng's copy of the letter are the words "be careful, must deflect this! how?" *Id.* In an internal Wharf document entitled "Agenda for meeting with Chairman," the word "stall" was written next to the topic "partnership strategy: UIH/others." *Id.* at 933. After significant pressing, Schneider met with Wharf's board in Hong Kong on March 18, 1994, to describe UIH's involvement in the Wharf cable project. Schneider told the board that UIH would be pleased to have the right to invest and was glad to be partners with Wharf. Approximately two hours after the meeting, Ng informed Schneider that the "board is not ready to entertain your investment at this time." Appellants' App. at 2453.

Instant litigation

UIH initiated this action in November 1994, asserting it had provided invaluable services that enabled Wharf not only to obtain the cable license, but also to develop and implement the system. UIH contended these services were rendered with

the parties' mutual understanding that UIH was entitled to a 10% option to invest in CNCL. According to UIH, Wharf sold the option on October 8 in exchange for UIH's services. UIH alleged Wharf deliberately misled UIH and never intended to honor the option to invest. Based on these facts, UIH asserted twelve claims for relief in its amended complaint, including violation of Section 10(b) of the Securities Exchange Act, violation of the Colorado Securities Act, breach of contract, fraud, breach of fiduciary duty, and negligent misrepresentation. UIH sought both compensatory and punitive damages.

Wharf denied all allegations and asserted UIH was aware from even preliminary negotiations that any deal was contingent on involvement of a telephone partner such as NYNEX. Wharf denied the existence of a joint venture. In addition, Wharf claimed the documentary evidence demonstrated its unequivocal intention not to be bound by anything short of a written agreement. Finally, Wharf contended any deal was subject to approval by each party's board of directors.

II.

Subject matter jurisdiction

On appeal, Wharf contends UIH has not stated an actionable federal claim and, as a result, we must dismiss not only the Rule 10b-5 claim but also the state claims. We consider this jurisdictional issue de novo. *See Brumark Corp. v. Samson Resources Corp.*, 57 F.3d 941, 944 (10th Cir. 1995).

In its complaint, UIH alleged subject matter jurisdiction existed by virtue of a federal question, namely securities fraud in violation of Section 10(b) of the Securities Exchange Act and Securities Exchange Commission Rule 10b-5. *See* 28 U.S.C. § 1331. UIH pleaded supplemental jurisdiction existed over the state law claims pursuant to 28 U.S.C.§ 1367(a). Implicit in Wharf's argument is the notion that dismissal of a

federal claim either in the district court or on appeal automatically compels dismissal of pendent state claims. This clearly is not our rule. We recognize that a federal court must have constitutional power to exercise pendent jurisdiction. The scope of a federal court's jurisdictional power, however, does not fluctuate with the fate of a federal claim at trial or on appeal, but exists if the federal claim initially had "substance sufficient to confer subject matter jurisdiction on the court." *Jones v. Intermountain Power Project*, 794 F.2d 546, 549 (10th Cir. 1986), *overruled on other grounds, Yellow Freight Sys., Inc. v. Donnelly*, 494 U.S. 820, 110 S.Ct. 1566, 108 L.Ed.2d 834 (1990). A federal claim is insubstantial, and incapable of conferring jurisdiction, "only if it is 'obviously without merit or is wholly frivolous,' or 'is clearly foreclosed by prior decisions of the Supreme Court.'" *Plott v. Griffiths*, 938 F.2d 164, 167 (10th Cir. 1991). Once federal question jurisdiction exists, it is within the trial court's discretion to exercise supplemental jurisdiction over those state law claims that derive from a common nucleus of facts. *See Thatcher Enters. v. Cache County Corp.*, 902 Fl2d 1472, 1477 (10th Cir. 1990). Thus, a district court has the constitutional power to exercise supplemental jurisdiction over state claims even after a federal claim has been dismissed, provided the federal claim was not insubstantial from the outset. *See* 13B Charles Alan Wright, Arthur R. Miller, Edward H. Cooper, *Federal Practice and Procedure*, § 3564 (1984), at 74 ("The practical importance of the distinction between [dismissal for failure to state a claim and dismissal for bringing an insubstantial claim] is that if the federal claim is substantial enough to invoke federal jurisdiction, the court has power to exercise pendent jurisdiction over other claims that also may be asserted in the complaint, for which there is no independent jurisdictional basis."). The same rule applies on appeal: "Once a trial is held . . . this court will order dismissal of a pendent claim on remand only when the federal cause of action was so insubstantial and devoid of merit that there was no federal jurisdiction to hear it." *Jones*, 794 F.2d at 549 (citations omitted). Therefore, we will

uphold the district court's exercise of jurisdiction if the allegations in UIH's complaint state a substantial and nonfrivolous 10b-5 claim.

Section 10(b) of the Securities Exchange Act, codified at 15 U.S.C.§ 78j, declared it

> unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange
>
> . . .
>
> (b) To use or employ, in connection with the purchase or sale of any security . . . any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe.

In accordance with section 10(b), the Commission prescribed 17 C.F.R. § 240.10b-5 (Rule 10b-5), which renders it unlawful for any person, in connection with the purchase or sale of any security:

> (a) To employ any device, scheme, or artifice to defraud,
>
> (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or
>
> (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person.

To state an actionable 10b-5 claim, a plaintiff must allege (1) the defendant made an untrue statement of material fact or failed to state a material fact; (2) the defendant made the misrepresentation in connection with the purchase or sale of a security; (3) the defendant made the misrepresentation with

scienter; and (4) the plaintiff relied on the misrepresentation and sustained damages as a proximate result of the misrepresentation. *See Anixter v. Home-Stake Prod. Co.*, 77 F.3d 1215, 1225 (10th Cir.1996).

In resolving Wharf's jurisdictional challenge, our task is to review UIH's complaint, identify the alleged security, ascertain whether it allegedly was purchased or sold as defined under the Securities Exchange Act, and determine if Wharf's alleged misrepresentations were made in connection with the purchase or sale of a security. After conducting this review, we are convinced that UIH's allegations not only are substantial and nonfrivolous, but state an actionable 10b-5 claim sufficient to withstand a motion to dismiss.

UIH has asserted throughout this case, without challenge from Wharf, that the security for 10b-5 purposes is not the CNCL stock but is the option itself ("The grant of the option to acquire at least 10% of the stock of CNCL was the sale of a security to [UIH], within the meaning of the Securities Exchange Act." Appellants' App. at 90). Wharf does not contest on appeal the classification of the option as a security. Therefore, we assume the option is a security for purposes of our review. *See One-O-One Enterprises, Inc. v. Caruso*, 848 F.2d 283, 1288 (D.C. Cir. 1988). UIH also alleges that the option was purchased by UIH on October 8, 1992, in exchange for its continued and expanded assistance to Wharf in the pursuit of the cable television bid. Thus, UIH was a purchaser of a security within the scope of the Exchange Act. Finally, UIH alleges that Wharf made material misrepresentations and omissions regarding the option. *See Superintendent of Ins. v. Bankers Life & Cas. Co.*, 404 U.S. 6, 12, 92 S.Ct. 165, 30 L.Ed.2d 128 (1971) (concluding the "in connection with" requirement is satisfied if plaintiff has "suffered an injury as a result of deceptive practices touching" the purchase or sale of a security). Wharf's representations allegedly were false when made and were made either with knowledge of their falsity or with reckless disregard for their truth or falsity. The

representations allegedly were made to induce UIH to purchase the option. As such, the misrepresentations were made to influence UIH's investment decision and were made in connection with the purchase or sale of a security. *See SEC v. Jakubowski,* 150 F.3d 675, 679 (7th Cir.1998); *Angelastro v. Prudential-Bache Secs., Inc.,* 764 F.2d 939, 943 (3d Cir.1985).

Wharf describes UIH's 10b-5 claim as involving a mere allegation that Wharf misrepresented its intent to sell UIH securities or a simple dispute between Wharf and UIH over its rights to purchase stock. Wharf claims such disputes are outside the scope of the federal securities laws. Wharf relies heavily on *Blue Chip Stamps v. Manor Drug Stores,* 421 U.S. 723, 95 S.Ct. 1917, 44 L.Ed.2d 539 (1975). In *Blue Chip Stamps*, the Court held that only actual purchasers or sellers of securities, or those designated by the Securities Exchange Act as purchasers or sellers, have standing to bring a private cause of action for a 10b-5 violation. *Id.* at 749, 95 S.Ct. 1917. Here, UIH was an actual purchaser as it purchased the option from Wharf on October 8, 1992. *Blue Chip* does not preclude UIH's 10(b)(5) claim. *See id.* at 751, 95 S.Ct. 1917 ("the holders of puts, calls, options, and other contractual rights or duties to purchase or sell securities have been recognized as 'purchasers' or 'sellers' of securities for purposes of Rule 10b-5, not because of a judicial conclusion that they were similarly situated to 'purchasers' or 'sellers,' but because the definitional provisions of the 1934 Act themselves grant them such a status").

Further, we disagree with Wharf's assertion that misrepresentations regarding intent to sell securities or disputes over a right to purchase stock necessarily are outside the scope of Rule 10-5. Courts have noted that fraud in the purchase or sale of a security includes entering into a contract to sell a security with a secret reservation not to fully perform the contract. *See In re Phillips Petroleum Secs. Litig.,* 881 F.2d 1236, 1245 n. 13 (3d Cir.1989); *Luce v. Edelstein,* 802 F.2d 49, 56 (2d Cir.1986); *Threadgill v. Black,* 730 F.2d 810, 811-12

(D.C.Cir.1984); *Richardson v. MacArthur*, 451 F.2d 35, 40 (10th Cir.1971). It is a party's secret reservation not to fully perform a securities contract that distinguishes these cases from routine breach of contract and common law fraud cases and brings them within the scope of Rule 10b-5. *See Mills v. Polar Molecular Corp.*, 12 F.3d 1170, 1176 (2d Cir. 1993).

We conclude the other cases cited by Wharf are distinguishable or inapposite. Two of the three cases involved breaches of contract and not misrepresentations regarding an option or other security. *Hunt v. Robinson*, 852 F.2d 786, 787 (4th Cir. 1988) (noting the plaintiff had "alleged no misrepresentation of the value of the stock which was to be conveyed"); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 194 (3d Cir.1976) (noting the plaintiff did allege fraud, but not just in connection with the sale that actually occurred). In the third case cited by Wharf, *Gurwara v. LyphoMed, Inc.*, 937 F.2d 380 (7th Cir.1991), the defendant misrepresented to plaintiff, its employee, that plaintiff's option to buy defendant's stock would be unaffected by his termination for disability. When plaintiff attempted to exercise his option after accepting a disability assignment, however, defendant cited his disability status and did not allow his purchase of the stock. Plaintiff sued under Rule 10b-5 for securities fraud. Unlike here, the plaintiff in *Gurwara* alleged that the security was the stock to be purchased and not the option to purchase the stock. Therefore, defendant's misrepresentations were not related to the stock but to the option, which was neither alleged nor assumed to be a separate security. The court dismissed the claim because defendant's misrepresentations related not to the value of the stock that plaintiff sought to purchase, but to the value of the option. In doing so, the court stated: "Whether [plaintiff] might have sued successfully under section 10(b) for misrepresentations in connection with his option contract is an issue we need not resolve. Throughout the lawsuit, [plaintiff] has clearly relied on the LyphoMed stock itself as the 'security'

on which his 10(b) action was based." *Id.* at 382 n. 2. Viewed in this light, *Gurwara* is entirely inapplicable to UIH's claim.[1]

In summary, if a party alleges a substantial and nonfrivolous federal claim, a district court obtains subject matter jurisdiction and may, in its discretion, exercise supplemental jurisdiction over related state law claims. Once subject matter jurisdiction exists, a district court has constitutional authority to hear related state claims even if the federal claim is later dismissed by the district court or by this court on appeal. Here, UIH's 10b-5 allegations clearly are not frivolous, and in fact are sufficient to state a claim under Rule 10b-5.

Applicability of Hong Kong law

Wharf argues that the relationship between Wharf and UIH was governed by Hong Kong law, that the application of Hong Kong law precludes application of the federal securities laws, and that nonapplicability of the federal securities laws prevents the exercise of federal jurisdiction.

We disagree with the premise underlying this argument—that forum selection or choice of law issues implicate a court's subject matter jurisdiction. Forum selection issues raise concerns not of subject matter jurisdiction but of

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[1] Moreover, in *SEC v. Jakubowski*, 150 F.3d at 679, the court retreated from *Gurwara*:

> *Gurwara* was foreordained by *Blue Chip Stamps*, which held that a misrepresentation that induces a decision not to purchase securities is outside the scope of § 10(b) and Rule 10b-5.... In both *Blue Chip Stamps* and *Gurwara* stock had a bargain element that eluded a potential purchaser because of a deceit, which fell outside Rule 10b-5 because there was no sale.... True enough, we wrote in *Gurwara* that the "misrepresentation went only to Gurwara's opportunity to purchase the stock at the described price. It in no way related to the value of that stock." ... But this passage was irrelevant to the question whether the statements were "in connection with" a (nonexistent) purchase or sale. Dicta cannot control over the language of the statute.

improper venue or failure to state a claim on which relief may be granted. *See Lipcon v. Underwriters at Lloyd's, London,* 148 F.3d 1285, 1289-90 (11th Cir.1998), *cert. denied,* 525 U.S. 1093, 119 S.Ct. 851, 142 L.Ed.2d 704 (1999); *New Moon Shipping Co., Ltd. v. MAN B & W Diesel AG,* 121 F.3d 24, 28 (2d Cir.1997); *Riley v. Kingsley Underwriting Agencies, Ltd.* 969 F.2d 953, 956 (10th Cir.1992). Choice of law issues are equally unrelated to subject matter jurisdiction; state and federal courts routinely apply the law of other states, even of other countries. *See Vukadinovich v. McCarthy,* 59 F.3d 58, 62 (7th Cir.1995); *Rivendell Forest Prods., Ltd. v. Canadian Pac. Ltd.,* 2 F.3d 990, 994 (10th Cir.1993). Although a district court applying foreign law might find it appropriate to exercise its discretion and either transfer venue or dismiss a case on grounds of forum nonconveniens, the court here denied Wharf's motion to dismiss for forum nonconveniens, a ruling that Wharf does not separately appeal.

Wharf has not presented any choice of law issue with respect to UIH's Rule 10b-5 claim. It is sufficient that the anti-fraud provisions of the Securities Exchange Act reach Wharf's conduct. These provisions prohibit fraud in the sale of securities when significant conduct occurs in the United States or conduct occurs anywhere and has substantial effects on investors in the United States. *See Bersch v. Drexel Firestone, Inc.*, 519 F.2d 974, 993 (2d Cir.1975); Restatement (Third) of Foreign Relations Law of the United States § 416 (1987). Here, the crux of UIH's 10b-5 claim is the October 8, 1992, meeting between Wharf and UIH in Denver, Colorado. The security was sold at that meeting, the negotiations for the sale occurred at that meeting, and the most material of Wharf's misrepresentations were made at that meeting. Since conduct material to the completion of the fraud occurred in the United States, jurisdiction is appropriate despite the fact that additional relevant conduct occurred abroad. *See Alfadda v. Fenn,* 935 F.2d 475, 478-79 (2d Cir.1991); *Psimenos v. E.F. Hutton & Co.,* 722 F.2d 1041, 1045-46 (2d Cir.1983).

Wharf has not identified any international comity or international choice of law issues that would reasonably compel a court to decline to exercise its jurisdiction in these circumstances. In general, we will not consider an international comity or choice of law issue unless there is a "true conflict" between United States law and the relevant foreign law. *Hartford Fire Ins. Co. v. California,* 509 U.S. 764, 798-99, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *In re Maxwell Communication Corp.,* 93 F.3d 1036, 1049-50 (2d Cir.1996). A true conflict exists only when a person subject to regulation by two states cannot comply with the laws of both. *Hartford Fire*, 509 U.S. at 799, 113 S.Ct. 2891; *Filetech S.A. v. France Telecom S.A.*, 157 F.3d 922, 932 (2d Cir.1998); *Metro Indus., Inc. v. Sammi Corp.*, 82 F.3d 839, 847 n.5 (9th Cir.1996). A true conflict would exist here only if Hong Kong law *compelled* securities fraud rather than just permitted it.

Wharf has presented scant evidence either that Hong Kong is the appropriate forum or that Hong Kong law applies to the dispute at issue. Wharf reasons that from language in unsigned documents which states that Hong Kong law applies and that the parties would submit to the non-exclusive jurisdiction of the Hong Kong courts, we can infer the parties intended that any forum selection and choice of law provisions be given effect. We disagree. These documents at best represent the parties' intent. The documents are virtually irrelevant in their unsigned form and are insufficient to constitute binding forum selection and choice of law provisions. "To be mandatory, a clause must contain language that clearly designates a forum as the exclusive one." *Northern California Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co.,* 69 F.3d 1034, 1037 (9th Cir.1995).

Wharf cites *Scherk v. Alberto-Culver Co.,* 417 U.S. 506, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974), and *Riley*, 969 F.2d 953. Neither case is contrary to the result we reach here. Both cases involved unambiguous forum selection clauses and choice of law provisions in signed, bargained-for contracts. Wharf also

cites provisions of Restatement (Second) of Conflict of Laws which direct that if parties have not specified the law to be applied, the law of the jurisdiction with the most significant relationship to the incident is adopted. Again, however, Wharf does not direct our attention to specific Hong Kong law that conflicts with the law of the forum. Contrary to Wharf's assertions, courts routinely decline to consider choice of law issues in the absence of a demonstrated conflict. *See In re Payless Cashways,* 203 F.3d 1081, 1084 (8th Cir.2000); *Millipore Corp. v. Travelers ICdem. Co.,* 115 F.3d 21, 29 (1st Cir.1997); *Oil Shipping (Bunkering) B.V. v. Sonmez Denizcilik Ve Ticaret A.S.,* 10 F.3d 1015, 1018 (3d Cir.1993); *Barron v. Ford Motor Co.,* 965 F.2d 195, 197 (7th Cir.1992).

Statute of Frauds

Wharf asserts the district court erred in refusing to instruct the jury on the statute of frauds. The court ruled that the option did not fit neatly within the definition of "security" under C.R.S. § 4–8–319, and that several exceptions took the option agreement outside the scope of the statute of frauds. We review de novo a determination that the statute of frauds does not apply. *See Horace Mann Ins. Co. v. Johnson*, 953 F.2d 575, 576 (10th Cir.1991) (reviewing district court's interpretation and application of state law de novo)

Wharf argues that UIH's oral option is barred by two Colorado statute of frauds provisions. First, Wharf urges us to apply C.R.S. § 4–8–319, the statute of frauds applicable to "a contact for the sale of securities." Second, Wharf seeks application of C.R.S. § 38–10–112(a), the statute of frauds for agreements that by their terms may not be performed within a year of their making. Wharf has waived its argument with respect to § 38–10–112(a) by failing to raise it in district court.

Section 4–8–319 provides that a contract for the sale of securities is not enforceable by way of action or defense unless (1) there is some writing signed by the party against whom enforcement is sought sufficient to indicate that a contract has

been made for sale of a stated quantity of described securities at a defined or stated price; (2) delivery of a certificated security or transfer instruction has been accepted, or transfer of an uncertificated security has been registered and the transferee has not timely sent a written objection; (3) there is a confirming writing; or (4), the party against whom enforcement is sought admits the contract in a pleading, testimony or court.[2]

Initially, we must identify what constitutes the alleged "security" for purposes of our analysis. Wharf asserts the security is CNCL stock. UIH asserts the option itself is the instrument that should be analyzed to determine if it is a "security." The October 8, 1992, contract was for the purchase of the option. UIH traded its services to Wharf and in turn received an option to purchase CNCL securities.

We next consider if the option is in fact a "security" for purposes of § 4–8–319. The definition of "security" under § 4–8–319 bears little resemblance to the defintion of "security" under federal securities laws. Section 4–8–102 classifies securities as either certificated or uncertificated. A certificated security is a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is

> (I) Represented by an instrument issued in bearer or registered form;
>
> (II) Of a type commonly dealt in on securities exchanges or markets or commonly recognized in any area in which it is issued or dealt in as a medium for investment; and

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[2] Section 4–8–319 was repealed in 1996. Under current Colorado law, a "contract or modification of a contract for the sale or purchase of a security is enforceable whether or not there is a writing signed or record authenticated by a party against whom enforcement is sought, even if the contract or modification is not capable of performance within one year of its making." C.R.S. § 4–8–113.

> (iii) Either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations.

C.R.S. § 4–8–102(1)(b). An uncertificated security is a share, participation, or other interest in property or an enterprise of the issuer or an obligation of the issuer which is

> (I) Not represented by an instrument and the transfer of which is registered upon books maintained for that purpose by or on behalf of the issuer; and
>
> (II) Of a type commonly dealt in on securities exchanges or markets; and
>
> (III) Either one of a class or series or by its terms divisible into a class or series of shares, participations, interests, or obligations; and
>
> (IV) Not a partnership interest in a limited partnership.

C.R.S. § 4–8–102(c).

Wharf has not explained, and we cannot discern, how UIH's option fits within either definition. We agree with the district court that UIH's oral option was not a security under § 4–8–102(1), but was a security under the federal Securities Exchange Act. See Comment to § 4–8–102 ("This definition has no bearing upon whether an interest is a 'security' for purposes of federal securities laws. By the same token the definitions of 'securities' for purposes of those laws has no bearing upon whether an interest is a security within the definition of this Article."). Because Wharf did not establish that the option was a security under 4–8–319, it was not entitled to rely on the statute of frauds.

The district court ruled that "several equitable exceptions" to the statute of frauds applied. Although the court mentioned in its order the fraud, promissory estoppel, and full performance exceptions, it primarily discussed the partial performance exception. We agree that, even if UIH's option is

a security for purposes of § 4–8–319, the partial performance exception precludes application of the statute of frauds. "[T]he part performance doctrine operates to preclude the application" of the statute of frauds. *Nelson v. Elway,* 908 P.2d 102, 108 (Colo. 1995). The doctrine applies if there is partial performance of an oral contract which is "(1) substantial; and (2) required by, and fairly referable to no other theory besides that allegedly contained within the oral agreement." *Id.* "This rule is based on the premise that the conduct constituting that partial performance must convincingly evidence the existence of the oral agreement." *Id.*

The alleged oral agreement between UIH and Wharf required UIH to provide additional services to Wharf. It cannot be disputed that UIH substantially, and most likely fully, satisfied its obligations. Indeed, Wharf does not dispute the assistance rendered by UIH, but asserts the assistance was fairly referable to Wharf's theory that UIH performed services relating to the cable television project in the hope of persuading Wharf to sell it 10% of CNCL stock. Because the issue of partial performance presents factual questions, *see A & R Co. v. Union Air Transport, Inc.,* 738 P.2d 73, 74-75 (Colo.App.1987), Wharf contends the district court improperly took this issue from the jury and exacerbated its error by failing to instruct on partial performance.

We conclude the district court did not take the issue of partial performance from the jury, nor did it err in instructing the jury. We review the district court's refusal to give a particular instruction for an abuse of discretion. As for the instructions, we conduct a de novo review to determine whether as a whole they correctly stated the governing law and provided the jury with an ample understanding of the issues and applicable standards. *Allen v. Minnstar, Inc.,* 97 F.3d 1365, 1368 (10th Cir.1996).

We agree with the district court that Wharf's proposed instruction on partial performance was superfluous. The breach

of contract instruction on consideration precluded recovery on breach of contract if the jury found that UIH "in exchange for the option . . . did or promised to do nothing more than it was already obligated to do, or was working voluntarily for its own benefit." Appellees' Suppl. App. at 81. Because the jury found that consideration existed and the oral option agreement was valid, it necessarily concluded that UIH provided Wharf assistance in exchange for the option and not for an extraneous reason or in accordance with a separate "fairly referable" theory proffered by Wharf. *See Ellis Canning Co. v. Bernstein,* 348 F.Supp. 1212, 1229 (D.Colo.1972).

We concede that a district court may properly give a separate instruction on partial performance if it is warranted by the evidence. In reviewing a claim of instructional error, however, we consider the instructions in their totality and determine not whether they were faultless in every particular, but whether the jury was misinformed or misled. *Resolution Trust Corp. v. Stone,* 998 F.2d 1534, 1549 (10th Cir.1998). We can discern no prejudice to Wharf based on the district court's failure to separately instruct the jury as to partial performance.

Economic Loss Rule

Wharf argues that UIH's fraud, breach of fiduciary duty, and negligent misrepresentation claims are barred by the economic loss rule. The economic loss rule is designed to preclude plaintiffs from circumventing the law of contract and seeking recovery in tort for what in essence is merely a claim of damages for breach of contract. As applied in Colorado, the rule "prevents recovery for negligence when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract." *Jardel Enterprises, Inc. v. Triconsultants, Inc.,* 770 P.2d 1301, 1303 (Colo.App.1988). Wharf asserts the economic loss rule is triggered here because UIH's tort claims do not allege tortious conduct independent of Wharf's breach of contract, but rest solely on UIH's allegation

that Wharf did not honor its option agreement. We review de novo the district court's rejection of Wharf's contentions. *See Horace Mann,* 953 F.2d at 576.

Wharf's argument that the economic loss rule precludes UIH's fraud and breach of fiduciary duty claims is without merit. It is settled in Colorado that the economic loss rule applies only to tort claims based on negligence, and only to *some* negligence claims. "As a general rule, no cause of action lies in tort when purely economic damage is caused by negligent breach of a contractual duty." *Jardel,* 770 P.2d at 1303. The Colorado Court of Appeals distinguished the situation in *Jardel,* which involved a breach of contract and negligence claim, from cases in which an intentional tort was alleged. *Id.* at 1304. Since *Jardel*, Colorado courts and courts applying Colorado law have noted this distinction and applied the economic rule accordingly. *See Town of Alma v. Azco Constr., Inc.* 985 P.2d 56 (Colo.App.1999) *Terrones v. Tapia,* 967 P.2d 216, 220 (Colo.App.1998); *Commercial Union Ins. Co. v. Roxborough Village Joint Venture,* 944 F.Supp. 827, 832 (D.Colo.1996); *Cook v. Rockwell Int'l Corp.,* 778 F.Supp. 512, 516 (D.Colo.1991). The Colorado Court of Appeals implicitly reinforced this interpretation of the economic loss rule in *Grynberg v. Agri Tech, Inc.,* 985 P.2d 59 (Colo.App.1999), where it prohibited plaintiffs from maintaining a negligence claim based on an alleged breach of a duty that arose only from the parties' contract. Without comment, the court allowed plaintiffs' breach of fiduciary duty claim to stand.

In characterizing UIH's fraud and breach of fiduciary duty claims as factually synonymous with UIH's breach of contract claim, Wharf assumes the economic loss rules bars all claims related to a contractual transaction except breach of contract claims. This assumption is erroneous. The economic loss rule precludes recovery in tort only when "the duty breached is a contractual duty." *Jardel,* 770 P.2d at 1303. The rule is inapplicable where "the duty breached ... arises independent of the contract." *Id.* at 1304. Here, UIH's breach of fiduciary

duty claim arose not from the contract but from the parties' status as joint venturers. *See McCrea & Co. Auctioneers, Inc. v. Dwyer Auto Body*, 799 P.2d 394, 398 (Colo.App.1989). UIH's fraud claim, although premised on representations made in the course of contractual negotiations likewise arose independently of the contract. In *Brody v. Brock*, 897 P.2d 769, 776 (Colo.1995), the Colorado Supreme Court rejected the trial court's ruling that representations that formed the basis for a common law fraud claim could not also form the substance of an alleged oral contract.

The rationale underlying the economic loss rule also explains why the rule does not preclude UIH's negligent misrepresentation claim. Where a negligence claim is based only on breach of a contractual duty, the law of contract rightly does not punish the breaching party, but limits the breaching party's liability to damages that naturally flow from the breach. It is an altogether different situation where it *appears* two parties have in good faith entered into a contract but, in actuality, one party has deliberately made material false representations of past or present fact, has intentionally failed to disclose a material past or present fact, or has negligently given false information with knowledge that the other party would act in reliance on that information in a business transaction with a third party. The breaching party in this latter situation also is a tortfeasor and may not utilize the law of contract to shield liability in tort for the party's deliberate or negligent misrepresentations.

Colorado has recognized that "a claim of negligent misrepresentation based on principles of tort law, independent of any principle of contract law, may be available to a party to a contract." *Mehaffy, Rider, Windholz & Wilson v. Central Bank Denver,* 892 P.2d 230, 235-36 (Colo. 995). A negligent misrepresentation claim is based not on a contractual duty but on an independent common law duty requiring a party, in the course of business, to exercise reasonable care or competence in obtaining or communicating information on which other

parties may justifiably rely. *Id.* at 236. Consequently, the economic loss rule does not bar UIH's negligent misrepresentation claim.

Sufficiency of evidence regarding oral option contract

Wharf contends the evidence introduced at trial was insufficient to support a finding that UIH had acquired an option to invest. Wharf asserts the documentary evidence—the draft letters of intent, memoranda of understanding, and shareholders' agreements—is flatly inconsistent with the concept of an oral option. "When a jury verdict is challenged on appeal, our review is limited to determining whether the record—viewed in the light most favorable to the prevailing party—contains substantial evidence to support the jury's decision." *Thunder Basin Coal Co. v. Southwestern Pub. Serv. Co.*, 104 F.3d 1205 (10th Cir. 1997). The jury has "the exclusive function of appraising credibility, determining the weight to be given to the testimony, drawing inferences from the facts established, resolving conflicts in the evidence, and reaching ultimate conclusions of fact." *Id.*

We conclude there is ample evidence in the record to support the jury's finding that UIH obtained an option on October 8, 1992. UIH officials testified that Ng specifically granted such an option in exchange for UIH's continued and expanded provision of services to Wharf. UIH partially or fully performed its obligations under the alleged option agreement. Internal Wharf documents, while not explicitly conceding that UIH had a 10% option to invest in CNCL, expressly discussed steps that Wharf should take to "get out" of the agreement and contemplated stalling and back pedaling. Viewed in light of the totality of the evidence presented at trial, the proposed unsigned documents heralded by Wharf do nothing more than create factual conflicts and raise questions of witness credibility. *See Mohler v. Park County School Dist. RE–2*, 32 Colo.App. 388, 515 P.2d 112, 114 (Colo.App.1973). The jury resolved these conflicts in favor of UIH by specifically finding

in the special verdict form that UIH and Wharf did not intend to be bound only by a written contract and that UIH would not have known that Wharf intended to be bound only by a written contract. *See* Appellant's App. at 1569. We will not disturb the jury's resolution of these issues where, as here, there is substantial evidence in the record to support the jury's verdict.

Damages

The jury awarded $67,000,000 in compensatory damages on the securities fraud claims, common law fraud claim, breach of contract claim, and breach of fiduciary duty claim, and $58,500,000 in punitive damages on the common law fraud claim and breach of fiduciary duty claim. Judgment was entered by the district court for $125,000,000 because UIH indisputably is limited to a single recovery for its loss. Wharf argues the compensatory damages award was not supported by the evidence, was speculative and facially excessive, and did not account for UIH's obligation to mitigate its damages. Wharf asserts the punitive damages award was not supported by the evidence and was contrary both to Colorado and federal law.

Compensatory damages

Wharf contends that the evidence introduced at trial was insufficient to sustain the $67,000,000 award. Specifically, Wharf argues that UIH damage expert Robert Jones grossly overstated the value of UIH's alleged option by failing to "deduct the price . . . UIH had to pay to exercise the option—a price guesstimated at $50,000,000 or more." Appellants' Br. at 40. In other words, Wharf argues Jones estimated the value of a 10% stock interest in CNCL without considering the corresponding 10% capital funding contribution UIH was required to make to exercise the option.

Initially, we must determine whether Wharf preserved this issue for review. To preserve a sufficiency of the evidence claim for appellate review, a party must move for judgment as

a matter of law (directed verdict) under Federal Rule of Civil Procedure 50(a) at the close of the evidence. *See FDIC v. United Pacific Ins. Co.*, 20 F.3d 1070, 1076 (D.C. Cir. 1994). Motions under Rule 50 must "specify the judgment sought and the law and the facts on which the moving part is entitled to the judgment." Fed.R.Civ.P. 50(a)(2). A party may not circumvent Rule 50(a) by raising for the first time in a post-trial motion issues not raised in an earlier motion for directed verdict. *See FDIC*, 20 F.3d at 1076.

Wharf asserts it raised this specific damage issue in its motion for directed verdict at the close of evidence and reasserted the issue in its post-trial motions. Clearly, Wharf presented the issue in its post-trial motions. *See* Appellants' App. at 1602. ("The Court should enter judgment for defendants or order a new trial because the jury's award is not supported by legally sufficient evidence. It is based on the asserted value of a 10% interest in the Wharf cable project, rather than the value of plaintiffs' alleged 'option' to obtain such an interest which is legally, economically and factually different.")

Wharf's motion for directed verdict at the close of evidence was made orally. It comprised ten transcribed pages in the trial record and covered a multitude of subjects. However, not once did Wharf mention damages. *Id.* at 10023–10033. Wharf argues the damage issue was included by implication in the other issues raised in the motion for directed verdict and thereby preserved for both post-trial and appeal purposes. In considering whether the grounds of a motion for directed verdict were stated with sufficient specificity, we liberally construe Rule 50 in light of its purpose "to secure a just, speedy, and inexpensive determination of a case." *Anderson v. United Tel. Co.*, 933 F.2d 1500, 1503 (10th Cir. 1991). Technical precision is unnecessary. A rigid application of the rule is in order only if such application serves either of the rule's rationales—protecting the right to trial by jury or ensuring an opposing party has sufficient notice of an alleged

error so that it may be cured before the party rests its case. *Id.* We consider whether the grounds stated in the motion are sufficiently specific on a case by-case basis. *See id.* at 1504.

Wharf has not satisfied the "specific grounds" requirement no matter how liberally we construe it. While Rule 50 "does not require technical precision in stating the grounds of the motion[,][it] does require that they be stated with sufficient certainty to apprise the court and opposing counsel of the movant's position with respect to the motion." 9A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2533 (1995), 310. "The statement of one ground precludes a party from claiming later that the motion should have been granted on a different ground." *Id.*

In *Green Const. Co. v. Kansas Power & Light Co.*, 1 F.3d 1005, 1012–13 (10th Cir. 1993), we refused to entertain on appeal a defendant's sufficiency of the evidence argument regarding the plaintiff's breach of contract, retainage, and alter ego claims where in its directed verdict motion the defendant raised sufficiency only with respect to plaintiff's misrepresentation claim. In *FDIC*, we rebuffed a defendant's attempt to raise sufficiency questions regarding proof of bond coverage because the defendant moved for directed verdict only on the ground that the plaintiff's claim "was based on speculation and conjecture." 20 F.3d at 1075. *See also Kientzy v. McDonnell Douglas Corp.*, 990 F.2d 1051, 1060 (8th Cir. 1993); *House of Koscot Dev. Corp. v. American Line Cosmetics, Inc.*, 468 F.2d 64, 67–68 (5th Cir. 1972). As these cases demonstrate, merely moving for directed verdict is not sufficient to preserve any and all issues that could have been, but were not raised in the directed verdict motion. *See First Sec. Bank v. Taylor*, 964 F.2d 1053, 1056–57 (10th Cir. 1992).

Since Wharf did not submit this issue to the district court until its post-trial motion for judgment as a matter of law, we may review its argument only to determine if there is *any* evidence to support the damage award. *United States v.*

Flintco, Inc., 143 F.3d 955, 967 (5th Cir. 1998); *House of Koscot*, 468 F.2d at 68 n.#5. Jones' testimony was more than sufficient to satisfy this standard. Jones was an experienced financial analyst with particular expertise in business valuation of cable television systems. He described in detail the basis and methods used to value UIH's loss and explained the rationale underlying his conclusions. His calculations represented a determination of the net present value that UIH's 10% investment in CNCL would have yielded had UIH contributed its 10% funding contribution. Jones' testimony indicated that in determining CNCL's net present value, he considered not only CNCL's projected revenue stream, but its operating expenses and, significantly, 100% of the projected capital/equity necessary to fund CNCL. This 100% by definition included UIH's 10% capital contribution requirement even if not precisely labeled as such in Jones' analysis. Jones discounted his net calculation to present value and multiplied by 10% to obtain the net value of UIH's 10% interest. Thus, the evidence introduced at trial supported the jury's $67,000,000 compensatory damage award. *See Hudson v. Smith*, 618 F.2d 642, 646 (10th Cir. 1980).

Wharf contends the jury's compensatory damage award was grossly excessive and based on sheer speculation. The district court's denial of Wharf's motion for new trial or remittitur on grounds of excessiveness will not be disturbed on appeal absent a gross abuse of discretion. *See Campbell v. Bartlett*, 975 F.2d 1569, 1577 (10th Cir. 1992). We will not disturb a jury's award of damages on a claim of excessiveness unless the award is so unreasonable as to shock the judicial conscience and to raise an irresistible inference that passion, prejudice, corruption, or other improper cause invaded the trial. *Sanjuan v. IBP, Inc.*, 160 F.3d 1291, 1300 (10th Cir. 1998). It is within the virtually exclusive purview of the jury to evaluate credibility and fix damages. *See Bennett v. Longacre*, 774 F.2d 1024, 1028 (10th Cir. 1985).

Wharf's excessive claim is without merit. Jones' testimony and the projections on which its was based provided a sufficiently precise basis for the jury's damage award. None of UIH's claims required measurement of damages by out-of-pocket expenses. UIH instead was entitled to compensation for the loss suffered by Wharf's wrongful deprivation of 10% of CNCL. Jones' testimony establishes this amount as $67,000,000. The jury's adoption of the amount established by Jones indicates it was swayed by his testimony, not by passion, prejudice, or other improper cause.

Wharf also asserts the award is improperly based on speculative income stream projections. Contrary to Wharf's contentions, however, new businesses are not precluded from seeking damages. Rather, damages are precluded only where there is mere anticipation that an entity will enter the marketplace or where the damages are themselves not reasonably determinable. *Roberts v. Holland & Hart*, 857 P.2d 492, 497 (Colo.App.1993). As with all claims, a damage award is permissible here if supported by "substantial evidence, which together with reasonable inferences to be drawn therefrom provides a reasonable basis for computation of the damage." *Pomeranz v. McDonald's Corp.*, 843 P.2d 1378, 1383 (Colo, 1993). Jones' testimony and the projections on which it was based provide a sufficiently precise basis for the jury's damage award. *See Brown v. Presbyterian Healthcare Servs.*, 101 F.3d 1324, 1330–31 (10th Cir. 1996); *Rainbow Travel Serv. v. Hilton Hotels Corp.*, (10th Cir. 1990).

Wharf challenges the district court's refusal to admit evidence of CNCL's post-1994 actual performance and UIH's purported failure to mitigate damages. We review a district court's exclusion of evidence for an abuse of discretion. *See Orjias v. Stevenson*, 31 F.3d 995, 999 (10th Cir. 1994). We will not disturb the district court's ruling absent a distinct showing it was based on a clearly erroneous finding of fact or an erroneous conclusion of law or manifests a clear error of

judgement. *See Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 727 (10th Cir. 1993).

At trial, Wharf sought to demonstrate that the cable project's actual performance was worse than forecasted by Jones and that Jones improperly assessed the risks associated with the project. The district court excluded the evidence as irrelevant because damages became fixed on the date Wharf finally denied UIH's option claim—March 18, 1994. *See Southern Colo. MRI, Ltd. v. Med-Alliance, Inc.*, 166 F.3d 1094, 1100 (10th Cir. 1999) ("Breach of contract damages are generally measured at the time of breach."). The court did not abuse its discretion in excluding this evidence.

As regards Wharf's contention that UIH failed to mitigate its damages, Wharf argued that UIH could have invested elsewhere the funds intended for investment in the cable project and that UIH's failure to do so required reduction of any compensatory damage award. An injured party claiming breach of contract generally has a "duty to take such steps as are reasonable under the circumstances in order to mitigate or minimize the damages sustained." *Fair v. Red Lion Inn*, 943 P.2d 431, 437 (Colo. 1997). A defendant bears the burden of proving the affirmative defense of failure to mitigate. "However, the defense of failure to mitigate damages will not be presented to the jury unless the trial court determines there is sufficient evidence to support it." *Id.* In its offer of proof made before trial, Wharf did not present any evidentiary support that UIH failed to mitigate its damages. Nor did it direct the court's attention to any evidence that UIH had a substitute investment opportunity. Further, production of such evidence would not have compelled admission of mitigation of damages evidence and the giving of a mitigation of damages instruction unless Wharf also offered evidence that UIH could not have accepted both the additional investment opportunity and the CNCL investment. See *Katz Communications, Inc. v. Evening News Ass'n* 705 F.2d 20, 26 (2d Cir. 1983); Restatement (Second) of Contracts § 347, comment f ("If the

injured party could and would have entered into the subsequent contract, even if the contract had not been broken, and could have had the benefit of both, he can be said to have 'lost volume' and the subsequent transaction is not a substitute for the broken contract."). The district court did not abuse its discretion in excluding Wharf's purported evidence of UIH's failure to mitigate damages.

Punitive damages

Wharf contends the evidence is insufficient to sustain the punitive damages award. Wharf argues the evidence at best indicates it "did not promptly advise UIH of its intention not to proceed with the transaction under negotiation." Appellants' Br. at 47. Wharf described UIH's injury as the loss of a contractual opportunity.

Colorado permits the imposition of punitive damages in "all civil actions in which damages are assessed by a jury for a wrong done to the person or to personal or real property, and the injury complained of is attended by circumstances of fraud, malice, or willful and wanton conduct." C.R.S. § 13–21–102(1)(a). Willful and wanton conduct is "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights and safety or others, particularly the plaintiff." C.R.S. § 13–21–102(b). The amount of punitive damages must be reasonable, and generally cannot exceed the amount of a compensatory damages award. C.R.S. § 13–21–102(a). A party must prove entitlement to punitive damages beyond a reasonable doubt. C.R.S. § 13–25–127(2). Whether the evidence is sufficient to support a punitive damages award is a question of law we review de novo. *Miller v. Byrne*, 916 P.2d 566, 580 (Colo.App. 1996). We consider the evidence in its totality and "in the light most supportive of the verdict." *Life Care Centers of America, Inc. v. East Hamden Associates Ltd. Partnership*, 903 P.2d 1180, 1188 (Colo.App.1995).

There was ample evidence to support the jury award. The jury necessarily found that on October 8, 1992, Ng agreed to grant UIH a 10% option, knowing even then that Wharf would not allow UIH to exercise that option. Wharf's internal memos in particular not only evidence Wharf's deliberate misrepresentations regarding the existence of UIH's option, but also reveal Wharf's internal generation of fabricated excuses and purposeful implementation of stall tactics in its subsequent dealings with UIH. Wharf points out that UIH's depiction of events was contradicted by other credible evidence. "The presence of conflicting testimony need not prevent a jury from deciding that one side has proven the existence of facts beyond a reasonable doubt." *Klein v. Grynberg*, 44 F.3d 1497, 1504 (10th Cir. 1995). Wharf had its opportunity at trial to convince the jury. Our review is complete if, as here, there is evidence in the record which if believed would support a punitive damages award beyond a reasonable doubt. *Id.*

Wharf also asserts the district court improperly declined to reduce or disallow the award pursuant to its authority under C.R.S. § 13–21–102(2)(a)–(c). The court properly considered Wharf's motion and rejected it based on Wharf's "utter disregard" of UIH. *See* Appellants' App. at 2092. Contrary to Wharf's assertion, § 13–21–102(2) does not "direct" a court to reduce a punitive damages award if the conduct has ceased, the deterrent effect has been accomplished, or the purpose of punitive damages has been otherwise served. The statute grants the district court discretion ("court may reduce or disallow the award"). If a punitive damages award is supported by sufficient evidence and not "grossly excessive" under the Constitution, the decision to let the award stand is a matter within the discretion of the district court.

Wharf finally argues the punitive damages award is unconstitutional. The question of whether the punitive damages award comports with state law is separate from the determination of whether it complies with the Due Process Clause of the Fourteenth Amendment. In *BMW of North*

America, Inc. v. Gore, the Supreme Court refined the analysis used to determine if a punitive damages award is "grossly excessive" and thus unconstitutional. 517 U.S. 559, 562, 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996). We review this issue de novo. *FDIC v. Hamilton*, 122 F.3d 854, 857 (10th Cir. 1997).

Under *BMW*, we engage in a multi-step analysis to determine if an award is constitutionally infirm. Initially, we identify the State interests that a punitive damages award is designed to serve. 517 U.S. at 568, 116 S.Ct. 1589. "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *Id. See Lexton–Ancira Real Estate Fund v. Heller*, 826 P.2d 819, 822 (Colo. 1992) (stating the general purposes of punitive damages are punishment of the defendant and deterrence against the commission of similar offenses by the defendant and others in the future). Next, we determine if the defendant received "fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574, 116 S.Ct. 1589. Three factors guide our analysis of whether a defendant received adequate notice of the magnitude of the penalty that might be imposed: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the punitive damages award to the actual or potential harm inflicted on the plaintiff; and (3) a comparison of the punitive damages award with the civil or criminal penalties that could be imposed for comparable misconduct. *Id.* at 583, 116 S.Ct. 1589. *See Deters v. Equifax Credit Information Servs.*, 202 F.3d 1262, 1272 (10th Cir. 2000).

Viewed in the light most favorable to UIH, the evidence depicts reprehensible conduct. The jury found Wharf deliberately misled UIH to secure for itself a sought-after license worth at least $500,000,000. Wharf's deliberate misrepresentations and nondisclosures were not limited to a single episode but occurred repeatedly over a protracted period of time. Wharf used UIH's name, contacts, and expertise (all

given with an understanding that UIH would have a right to invest in CNCL) to obtain the franchise and then used its financial and negotiating leverage to string on UIH for several months. UIH's injury admittedly was economic in nature and thus less worthy under *BMW* of a punitive damages award. *See BMW*, 517 U.S. at 576, 116 S.Ct. 1589. The nature of the injury, however, is just one factor among many. "[I]nfliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." *Id.* There was sufficient evidence here to support a conclusion that Wharf's affirmative acts of misconduct were intentional.

We next consider the ratio of the punitive damages award to the actual or potential harm to the plaintiff. Although the Court eschewed any precise mathematical formula in BMW, it appeared to consider any punitive damages award more than ten times the amount of either the actual *or* potential harm to the plaintiff to be dangerously close to the boundary of constitutional infirmity. 517 U.S. at 581, 116 S.Ct. 1589. This factor weighs compellingly in favor of UIH. The $58,500,000 punitive damages award, although large, was only 87% of the $67,000,000 compensatory damages award. Only in rare circumstances will we find a punitive damages award to be "grossly excessive" where the ratio of the punitive award to the compensatory award is less than 1:1. *See Hamilton*, 122 F.3d at 861 (finding a 6:1 ratio permissible in a purely economic injury case). There is no precise ratio that is excessive as a matter of law. *Post Office v. Portec, Inc.*, 913 F.2d 802, 810 (10th Cir. 1990).

Last, we compare the punitive damages award to the amount of civil and criminal penalties that could be imposed on Wharf for comparable misconduct. A person or entity violating the Securities Exchange Act is subject to penalties of fine and imprisonment. A fine of up to $2,500,000 may be imposed upon a corporate entity. Natural persons may not be fined more than $1,000,000 but may be imprisoned for up to ten years. *See*

15 U.S.C. § 78ff(a). The Colorado Securities Act likewise permits fines up to $750,000 and imprisonment between four and sixteen years for willful violations of its provisions. *See* C.R.S. § 11–51–603; C.R.S. § 18–1–105. The fines are relatively stiff, but obviously not as severe from a financial point of view as the amount of punitive damages levied against Wharf. This fact alone, however, does not compel reduction of the punitive damages award. Comparison of the award to civil or criminal penalties is only one of the indicators of whether a defendant is on notice of the magnitude of the award that may be imposed based on the defendant's misconduct. In Colorado, a defendant is on notice of the magnitude of the penalty by virtue of C.R.S. § 13–21–102(1)(a). That section generally prohibits a punitive damages award in excess of the compensatory award. Thus, a defendant is on notice that a potential punitive award varies the magnitude of the actual harm caused by the defendant, but only rarely will it exceed the amount reflective of the actual harm. In other words, the greater the harm, economic or otherwise, inflicted by the defendant, the greater the potential punitive award.

We agree that, the punitive damages award here is large. However, it is only 87% of the compensatory damages award and is a product of the immensity of UIH's loss. Coupled with the reprehensible nature of Wharf's conduct, the award was not "grossly excessive" in violation of the Fourteenth Amendment.

Prejudgment interest

Wharf contends the district court erred in awarding UIH $28,208,440 in prejudgment interest. The district court awarded prejudgment interest on the compensatory damages award at eight percent interest from October 31, 1992, to May 21, 1997, the date of entry of judgment.

In Colorado, a prevailing party is entitled to prejudgement interest "[when money or property has been wrongfully withheld." C.R.S. § 5–12–102(1)(a). "[I]nterest shall be an amount which fully recognizes the gain or benefit realized by

the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered, whichever first occurs." *Id.* Section 5–12–102 is broadly construed "to effectuate the legislative purpose of compensating parties for the loss of money or property to which they are entitled." *Westfield Dev. Co. v. Rifle Inv. Assocs.*, 786 P.2d 1112, 1122 (Colo. 1990). Whether a particular factual circumstance falls within the terms of the prejudgment interest statute is a question of law reviewed de novo. *See Frontier Exploration, Inc. v. American Nat'l Fire Ins. Co.*, 849 P.2d 887, 893 (Colo. App. 1992).

Wharf contends § 5–12–102 is not applicable here because nothing was "wrongfully withheld" as UIH claims only a "right to future income." *See Bennett v. Greeley Gas Co.*, 969 P.2d 754, 766 (Colo. App. 1998) ("prejudgment interest may not be awarded for future lost profits or earnings"). We disagree. It is settled in Colorado that "one who is damaged by a breach of contract is entitled to recover prejudgment interest of eight percent annually from the time of the breach." *Ballow v. PHICO Ins. Co.*, 878 P.2d 672, 684 (Colo.1994). Likewise, "one who is damaged by a breach of [fiduciary] duty may recover prejudgment interest from the date of the breach, since it is the breach itself that makes the conduct wrongful." *Vento v. Colorado National Bank-Pueblo*, 907 P.2d 642, 647 (Colo.App.1995). Section § 5–12–102 is not limited to breaches of either contract or fiduciary duty. As we have observed, "[i]t would appear . . . that victims of tortious conduct are clearly entitled to prejudgment interest under the statute." *Estate of Korf v. A.O. Smith Harvestore Prods., Inc.*, 917 F.2d 480, 486 (10th Cir.1990). Because UIH prevailed on its contract and tort claims, it is entitled to prejudgment interest under C.R.S. § 5–12–102.

Post-judgment issues — contempt and sanctions

Federal Rule of Civil Procedure 62(a) provides that a prevailing party may not execute a judgment until ten days

after the entry of judgment. Even after the expiration of ten days, execution of a judgment is stayed pending appeal once the appellant files a supersedeas bond. Fed. R. Civ. Pro. 62(d). Wharf did not satisfy the judgment within ten days or file a supersedeas bond, despite its undisputed financial ability to do so. UIH sought execution of the judgment after obtaining leave from the court to register the judgment under 28 U.S.C. § 1963. After learning that Wharf was in the process of selling a hotel in California, UIH filed a motion in the United States District Court for the Central District of California for an order that UIH was entitled to the sale proceeds. The court granted the motion. In defiance of the order, Wharf closed the sale and transferred the funds from the United States. Next, UIH propounded interrogatories in an attempt to identify Wharf's assets in the United States. Wharf's responses to the interrogatories indicated it had less than $50,000 in the bank accounts in New York.

On July 23, 1997, UIH filed a Motion for Assistance in Connection with a Writ of Execution. The motion sought a turnover order commanding Wharf to deliver certain personal property consisting of various foreign bank accounts and stock certificates to the United States Marshal for the District of Colorado. A magistrate judge granted the motion pursuant to his authority under Federal Rule of Civil Procedure 69(a) and Colorado Rule of Civil Procedure 69(g). The magistrate directed Wharf to collect $150,000,000 of assets in Hong Kong and Singapore and transfer them to the clerk of the court. Wharf filed objections and the district court entered an order staying enforcement of the order until a hearing could be held. The district court conducted a hearing on October 23 and affirmed the magistrate's order. The court rejected Wharf's contention that the turnover order provided UIH undeserved injunctive relief, and reiterated that "Wharf can avoid all of this difficulty by posting a supersedeas bond." Appellants' App. at 2121. Wharf did not comply with the turnover order and its motion for stay of the order was denied.

On November 17, the district court entered an order directing Wharf to show cause why it should not be held in contempt of court. At a hearing on December 4, the court ruled that Wharf willfully and inexcusably was in contempt of court. The court required that Wharf pay UIH's attorney fees in connection with the post-judgment proceedings. The attorney fee order was not subject to vacatur. Further, the court allowed Wharf to purge itself of contempt if it posted a supersedeas bond within ten days from the date of the hearing. Also, the court imposed a daily monetary contempt sanction equivalent to the amount of the daily interest accruing on the judgment. The court cautioned Wharf that after expiration of the ten-day grace period, the accruing monetary sanction would not be vacated under any circumstances. The sanction was to continue until Wharf posted a supersedeas bond or compiled with the turnover order.

Wharf did not post a supersedeas bond by the end of the ten-day grace period. The court issued an order reiterating the sanction and advising Wharf the sanction was no longer subject to vacatur. At a hearing on December 22, the court considered alternative measures and added additional provisions to its contempt order after counsel advised that Wharf had not posted a supersedeas bond. First, the court barred Wharf from seeking equitable relief from the court as long as Wharf remained in contempt. Second, the court ruled:

> Wharf Holdings shall not, directly or through any person or entity under its direct or indirect control, transact any business . . . with any bank, brokerage, or other institution, wherever located, that (a) is in the business of loaning money, raising money for the benefit of others, accepting money or other property for deposit, or transferring or facilitating the transfer of money or property for the benefit of others, and (b) is chartered or incorporated or maintains a branch or office in the United States, including without limitation [numerous banks].

Id. at 2233-34. Under the terms of the court's order, "transacting business" included depositing, receiving, or transferring money from any of the long list of financial institutions.

In mid-January 1998, Wharf sought to obtain a supersedeas bond. The court ordered cessation of accrual of contempt sanctions and, on January 27, approved Wharf's supersedeas bond and ordered UIH to stay enforcement proceedings against Wharf pending appeal. The court vacated its October 23, 1997, turnover award. At the time the contempt sanctions ceased, $944,233.10 in contempt sanctions and $144,457.91 in attorney fees had accrued.

Wharf appeals the imposition of the sanctions and fees. Wharf urges us to reverse and vacate the district court's order because (1) the court lacked subject matter jurisdiction over the underlying matter; (2) the turnover order constituted improper use of equitable relief to assist money judgment creditors in the collection of judgments; and (3) the turnover order violated principles of extraterritoriality and international comity. We review the district court's interpretation of Colorado law de novo. *See Gust v. Jones*, 162 F. 3d 587, 591 (10th Cir. 1998).

The plain language of Federal Rule of Civil Procedure 69(a) unambiguously permits a federal district court sitting in Colorado to reference and apply Colorado law in "proceedings on and in aid of execution," unless a federal statute governs such proceedings. "Federal Rule of Civil Procedure Rule 69(a) . . . defers to state law to provide methods for collecting judgments." *Mackey v. Lanier Collection Agency & Services, Inc.*, 486 U.S. 825, 834, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988). As a result, the district court's turnover order was valid if authorized by Colorado law. *See* 12 Charles Alan Wright, Arthur R. Miller, Richard L. Marcus, *Federal Practice and*

Procedure, § 3012 (1997), at 148. Colorado Rule of Civil Procedure 69(g) provides:

> The court, master, or referee may order any party or other person over whom the court has jurisdiction, to apply any property other than real property, not exempt from execution, whether in the possession of such party or other person, or owed the judgment debtor, towards satisfaction of the judgement. Any party or person who disobeys an order made under the provisions of this Rule may be punished for contempt. Nothing in this Rule shall be construed to prevent an action in the nature of a creditor's bill.

Colorado clearly recognizes that "[i]ssuance of writ of execution . . . is not an exclusive remedy, and the plaintiff . . . therefore [is] entitled to employ supplemental proceedings in aid of execution to collect the judgment from the defendants' property." *First Nat'l Bank of Denver v. District Court*, 652 P.2d 613, 617 (Colo. App. 1982). Rule 69(g) gives effect to this entitlement and permits entry of a turnover order comparable to the order entered by the district court here.[3] *See Hudson v. American Founders Life Ins. Co.*, 160 Colo. 420, 417 P.2d 772 (Colo.1996) (construing former Rule 69(f)).

Wharf argues the turnover order was in effect a mandatory injunction entered by the court without making the factual findings that are a prerequisite to a grant of injunctive relief. Under the plain language of Federal Rule 69(a), such factual findings are necessary only if compelled by the provisions of a federal statute or the applicable state rules for execution of judgments. Wharf has not directed us to any authority

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[3] The host of cases cited by Wharf are not to the contrary. Those cases all involved reversal of district court enforcement actions that were invalid because the actions taken were not authorized by or effectuated in accordance with state law. *See, e.g., Aetna Cas. & Sur. Co. v. Markarian*, 114 F.3d 346, 349-50 (1st Cir.1997); *Hilo v. Estate of Marcos*, 95 F.3d 848, 856 (9th Cir.1996).

interpreting Colorado law as requiring a district court to make factual findings sufficient to warrant injunctive relief before acting under Colorado Rule 69(g).

Wharf also asserts the turnover order conflicts with principles of extraterritoriality and the comity of nations. Extraterritoriality principles limits the United States' ability to hold a party legally accountable for conduct that occurred beyond its borders. Here, the district court merely directed a party over whom it had personal jurisdiction to turn over assets. The location of those assets is irrelevant. *See In re Simon*, 153 F.3d 991, 997 (9th Cir. 1998). "Once personal jurisdiction of a party is obtained, the District Court has authority to order it to 'freeze' property under its control, whether that property be within or without the United States." *United States v. First National City Bank*, 379 U.S. 378, 384, 85 S.Ct. 528, 13 L.Ed.2d 365 (1965). Comity "counsels voluntary forbearance when a sovereign which has a legitimate claim to jurisdiction concludes that a second sovereign also has a legitimate claim to jurisdiction under principles of international law." *United States v. Nippon Paper Indus. Co.*, 109 F.3d 1, 8 (1st Cir. 1997). Wharf has not offered a compelling reason to justify overruling the turnover order on comity grounds. Compliance with the turnover order did not require Wharf to violate Hong Kong law, nor did it preclude Wharf from satisfying its obligations elsewhere. At best, Wharf has demonstrated that its willful noncompliance with the turnover order led to complications between Wharf and its banks. The fault in that regard lies with Wharf, not the district court.

Having determined that the district court had authority to enter the turnover order, we next determine if it acted properly in holding Wharf in contempt for failure to comply with that order. We review a finding of civil contempt under an abuse of discretion standard. *O'Connor v. Midwest Pipe Fabrications, Inc.*, 972 F.2d 1204, 1209 (10th Cir. 1992). A district court has broad discretion in using its contempt power to require adherence to court orders. *Id.*

Wharf argues the district court improperly used its contempt power to force compliance with a money judgment. This argument misconstrues the nature of the court's order. The court held Wharf in contempt for failing to comply with the court's properly entered turnover order. Colorado has specifically contemplated a finding of contempt and imposition of sanctions for failing to comply with a turnover order.

> To be sure, in the course of execution proceedings upon such a [money] judgment, a court may enter ancillary orders directing that the judgment debtor take certain actions, including the transfer of property. A willful failure to comply with such an order could furnish the predicate for the imposition of remedial or punitive sanctions.

In re Marriage of Nussbeck, 949 P.2d 73, 77 (Colo. App. 1997), *reversed on other grounds*, 974 P.2d 493 (Colo. 1999).

The district court did not abuse its discretion in finding Wharf in contempt of court and in imposing sanctions. Nothing more was required of Wharf than of any other litigant. A party against whom judgment is entered may either satisfy the judgment or post a supersedeas bond. Wharf opted to do neither. Its decision to ignore the turnover order was willful by its own admission. Wharf indisputably had sufficient financial resources either to satisfy judgment or to post a supersedeas bond.

AFFIRMED.

APPENDIX C

TRANSCRIPT OF ORAL ARGUMENT AND ORDER OF OCTOBER 23, 1997, DENYING DEFENDANTS' POST-TRIAL MOTIONS (UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

UNITED INTERNATIONAL HOLDINGS, INC., et al., Plaintiffs, vs. THE WHARF HOLDINGS LIMITED, et al., Defendants.	94 K 2560

ORAL ARGUMENT
TRANSCRIPT OF PROCEEDINGS

Proceedings held before the HONORABLE JOHN L. KANE, JR., U.S. District Judge, for the District of Colorado, beginning at 9:00 a.m. on the 23rd day of October, 1997, in Courtroom C-401, United States Courthouse, Denver, Colorado.

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Proceedings recorded by electronic sound recording;

transcript produced by transcription service.

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PROCEEDINGS

(At 9:00 a.m. on October 23, 1997, in the United States District Court at Denver, Colorado, before the HONORABLE JOHN L. KANE, JR., U.S. District Judge, with counsel for the parties present, the following proceedings were had:)

THE COURT: Good morning. We have UIH, et al., versus Wharf Holdings Limited, and the matter is set for argument on motions. I want to hear the Rule 50 motions and the post-trial motions for a new trial first, and then we'll go to the magistrate's orders after that.

The arguments—I suppose I should mention to you, because it perplexes me, that in two months shy of twenty years sitting up here on this perch, and the years of practice in the federal courts before that, other than Ruled 60(b) motions for newly discovered evidence, this is the first motion for new trial that I've ever encountered, and I thought that it was an artifact of the Rules of Civil Procedure that was never used any more, and then I started to read some cases, and most of them in the Seventh Circuit seem to come from Kirkland and Ellis.

So there must be something going on over there with one of those former law professors that I don't know about. But I just want you to know it's a very, very unusual experience to have this kind of motion. We used to have them in the state court all the time, but that's all I can tell you about the motion right now.

Mr. Jentes? Mr. Bauer?

MR. JENTES: Thank you.

MR. BAUER: Yes, Your Honor, Scott Bauer with Petrie, Bauer and Vriesman for the defendants. What I'd first like to do is introduce someone else entering an appearance in the matter today.

THE COURT: All right.

MR. BAUER: Mr. Paul Dodyk with Cravath, Swaine and Moore in New York. He was admitted to the District of Colorado Bar earlier this month, and he is entering an appearance today.

THE COURT: Good morning. Would you like to be on a committee? We have lots of them.

MR. DODYK: I didn't come here for that purpose, Your Honor.

THE COURT: All right.

MR. JENTES: Your Honor, Bill Jentes. What we would like to do is to argue just a few points that we think are particularly important regarding these post-trial motions. We're appreciative that Your Honor has set the oral argument today, and between Mr. Dodyk and myself, we'll certainly be prepared to answer any questions you have, or address any issues that you wish to have addressed. But as we indicated when we first filed the post-trial motion, many of these issues I think have been hammered out pretty extensively in motions that go all the way back to the original motions directed to the complaint and through the summary judgment motions.

So it didn't seem particularly worthwhile to devote attention to those, but again I repeat if Your Honor feels that there's things that you want to have touched on in that, we're happy to do that.

What we would like to do is focus on the compensatory damages and the punitive damages, and address our objections, not across the board on all of those damage awards, but certainly on some points that we think ought to lead Your Honor to get rid of the compensatory damages, and even if Your Honor doesn't do that, to disallow the punitive damages. And Mr. Dodyk is prepared to address the compensatory side, and I'll address the punitive side if that's satisfactory.

THE COURT: Sure, that's fine.

MR. DODYK: May it please the Court, Paul Dodyk for Wharf Holdings Limited.

Your Honor, I come here this morning to urge that Your Honor vacate the jury damage award. I know that's rather a lot to ask. I know I haven't invested all the time that has been invested, but I believe, Your Honor, I respectfully submit that I think vacatur is required under the circumstances of this case, required by the applicable law and certain facts which I think Your Honor will find are not susceptible of being reasonably contested.

And I really only have five points to make here this morning, and the first of those points is that plaintiffs throughout this proceeding have claimed that they had an option or right to acquire 10 per cent of the stock of Wharf Holdings Cable System in Hong Kong for some millions of dollars. And although there is very little evidence in the record on the exercise price, or the investment required, in terms of any evidence from the witnesses, it is an amount which plaintiff's counsel has variously estimated as $40 to $60 million.

Your Honor, I submit secondly the controlling proposition of law is that in determining the damages from the exercise—from the deprivation of an option, that you must subtract the exercise price from the value of the stock subject to the option.

The third point which I would make to Your Honor is that plaintiff's expert Jones did not value UIH's alleged option. He determined the value of 10 per cent of the stock of the Wharf Cable System, and that's all he did. He did not deduct the exercise price or the investment which UIH was obligated to make from his estimated valuation of the Wharf Cable System stock at $670 million, and of UIH's 10 per cent interest at $67 million.

Your Honor, the fourth point I want to make is that in closing, plaintiff's counsel repeatedly told the jury that Mr. Jones had concluded that UIH's option, or right to invest, was worth $67 million over and above the exercise price, or the investment which UIH was required to make.

And my fifth point, Your Honor, is that in awarding compensatory damages on plaintiff's claim for breach of contract, fraud, fiduciary duty and securities violations of $67 million, the jury relied upon and accepted plaintiff's counsel's representation that Mr. Jones had in fact deducted the exercise price, or investment required, from his valuation of the Wharf Cable System. And I respectfully submit, Your Honor, that those five propositions are, first, indisputably true and, second, require vacatur of the damages award as a matter of law.

Now, if Your Honor please, I would like to devote a little time to explaining each of these five propositions. I take it that I need not spend much time in persuading the Court that the plaintiffs throughout this trial claimed that the right of which they had been deprived was an option to acquire 10 per cent of the stock of the Wharf Cable System. It's throughout the complaint, throughout the opening, throughout the closing. Nor is there any doubt that UIH would have had to pay a very substantial amount of money in order to exercise that option.

Plaintiffs repeatedly admitted that to exercise the option, they would have to contribute 10 per cent of the equity capitalization of the Wharf Cable System. And while, as I have said, there is not any direct evidence put in by plaintiff's counsel as to what that exercise price would be, plaintiff's counsel, in argument, acknowledged that the payment would be 40, 50, 60, $70 million, a very substantial amount of money.

But my point, point one, is only to say to Your Honor that the claim in this case by UIH is that they were deprived of the value of an option to acquire 10 per cent of the stock of Wharf Cable for a very substantial amount of money. And I submit also, Your Honor, that as a matter of law, there is no

reasonable doubt that in valuing an option, or a right to acquire stock, you have to deduct the exercise price.

We have cited to Your Honor the Second Circuit opinion in *Hermanowsky v. Actin Corp.* (phonetic) for the proposition that in the case of an option, and I quote, "The proper measure of damages is the difference between the market value of the stock and the option price." But I would hope that we wouldn't have to go all the way to the Second Circuit to reach agreement on that proposition.

I would hope that we would all agree that if I gave someone the right or the option to purchase my antique coffee pot for a thousand bucks, that that right would be calculated only by subtracting from the value of that coffee pot, the $1,000 which you had to pay. It is really quite analogous to the proof of profit in a breach of contract case.

I submit, Your Honor, that's equally true of an option to buy 10 per cent of the stock of Starbucks or Wharf Cable. You can't reasonable value the right to purchase its stock without subtracting the amount of the exercise price.

Now, I think it's the third point, Your Honor, where there will be controversy this morning, and my third point is that Mr. Jones did not determine the value of UIH's alleged option. He valued the Wharf Cable System, and he valued UIH's 10 per cent stock interest in that system. He did not deduct the exercise price which UIH was obligated to pay from his estimate of the value of the system. He wasn't asked to value the contribution which UIH had to make to exercise its option.

Throughout the direct examination, plaintiff's counsel asked Mr. Jones questions like to teach us generally how you value a cable television system. He asks, "Are there various methodologies that you can use in valuing a cable television system?" Mr. Jones testifies so we have a combination of things we're looking at as far as the value of the company. He

describes his study as determining the net present value of UIH's 10 per cent interest.

During the—excuse me, Your Honor. He is then asked by counsel this question. "I want to question you specifically about the valuation you did as of March, 1994. Do you remember expressing an opinion that there was a $67 million value to UIH?" And he answers, "Yes."

Now, throughout his direct examination, Your Honor, Mr. Jones was not asked a single question about UIH's alleged option. He was not asked to value UIH's option or its right to acquire 10 per cent of the Wharf Cable System. He wasn't asked about the exercise price. He wasn't asked to value the investment which Wharf had to make in order to exercise its right to purchase 10 per cent.

That Mr. Jones did not value the option becomes crystal clear on cross. He's asked whether he valued an option or a 10 per cent stockholding in UIH, and he testifies, "I valued a 10 per cent economic interest of CNCL." Question, "You valued—what you did was to value a 10 per cent interest in the cable company; right?" Answer, "Yes." He testifies again, "I was asked to again determine the 10 per cent economic value of CNCL, understanding what was claimed in the complaint."

Now, we come to a point in the Jones testimony on cross where he attempted to pass off what he was doing as a valuation of the option as well, and he says, "I valued the option as equivalent, as an equivalent of the 10 per cent economic interest in CNCL."

I submit, Your Honor, that Mr. Jones' testimony leaves no doubt that he valued only a 10 per cent stock interest in Wharf Cable, and treated UIH's alleged option as equivalent to that interest. The problem is that UIH's option to buy 10 per cent of Wharf Cable stock is not the equivalent, because UIH had to pay many, many millions of dollars to buy its 10 per cent interest in Wharf Cable.

The value of the right to buy my antique coffee pot for $1,000 is not the same as the value of my antique coffee pot. The value of UIH's right to buy 10 per cent of the stock of Wharf Cable for 40 or 50 or 60 or $70 million is not equivalent to the value of a 10 per cent stockholding in Wharf Cable. It is smaller. It is 40 to $70 million smaller.

The record, therefore, Your Honor, does not support any contention that Mr. Jones calculated the value of UIH's 10 per cent interest in Wharf Cable after deduction of the exercise price or the investment which UIH was obligated to make if it was ever to become the owner of that stock.

Now, Your Honor, I understand that the Jones report is not in evidence, but I think we're going to wind up there before this is over, and so if you take a look at that report, it makes it perfectly clear—perfectly clear that Mr. Jones was not valuing UIH's alleged option. He did not deduct the exercise price, or what is the same thing, the investment required of UIH from his estimate of 10 per cent of the system's value.

Mr. Jones repeatedly described his study as "valuations of Wharf Cable's Television System in Hong Kong as determining the value of the cable television system in Hong Kong, as discounted cash flow valuations for the system as of October, 1992 and March, 1994." Nowhere in that report does Mr. Jones say he is valuing an option to buy 10 per cent of the Wharf Cable System. Nowhere does he even mention the exercise price. Nowhere does he attempt to determine the value of that exercise price, or deduct it from the value of a 10 per cent stock interest.

Your Honor, Mr. Jones' study, his conclusion cannot at one in the same time be a valuation of that 10 per cent stock interest and a valuation of an option to buy that stock interest for some millions of dollars.

I submit, Your Honor, that no one can reasonably argue that a study which is on its face an estimate of the value

of 10 per cent of the Wharf Cable System is also an estimate of the value to—of the right to acquire that 10 per cent for a payment of many millions of dollars.

Now, Your Honor, this gets a little complicated if you get below this level and go into the guts of the Jones' study. But if you get into the guts of the Jones' study, you will see that the study is exactly what he said it is. It is a discounted cash flow valuation of the enterprise value of the Wharf Cable System, and a 10 per cent stockholding in that system. It is not a valuation of an option.

Mr. Jones used what's called a discounted cash flow analysis to determine the enterprise value of that system. There are two generally recognized methods of valuing enterprises by the income method. One is called the GAP income method and the other is called the DCF method.

The GAP income method depends on the generally accepted accounting principles and the reporting of income by a corporation in accordance with those principles on an accrual basis. In valuing an enterprise based on the GAP method, what you do is you take their accounting income and apply a price earnings multiple or ratio, and the result is the value of the business.

In a discounted cash flow analysis of the business, you put to one side the GAP numbers, and you simply take a look at the cash flows in the business. You take into account all the revenue on the one hand, and all the expenditures on the other hand. You subtract the revenues from the expenditures on a year by year basis and get a total pot of money.

Now, the significant thing about a DCF analysis and the difference between a DCF analysis and a GAP analysis is that in a DCF analysis, you subtract the capital expenditures in the year in which the capital expenditure is made. You don't spread the capital expenditure over the life of the asset as you do in a GAP method.

The reason that that's important, Your Honor—the reason that's important is when you deduct the capital expenditures in a discounted cash flow analysis, you are not subtracting an investment in order to determine the value of an option. A DCF analysis means that you take all of the revenues in each year and all of the expenditures and you subtract the expenditures from the revenues, including the capital expenditures. In fact, the principal difference between a DCF analysis and a GAP analysis is that you depreciate capital assets in a GAP analysis, but in a DCF analysis, you deduct it in the year when made.

Now, in a DCF analysis, you can also take account of the capital flows. That is to say in determining the value of the enterprise, you also consider the amount of the capitalization of the company. But just as with the deduction of capital expenditures, you do not do that for the purpose of determining the value of an option to buy stock, or an option to buy the enterprise. You are valuing the enterprise on a basis which takes into account the capital structure of that enterprise.

Now, in the particular DCF analysis which Mr. Jones did, that's exactly what he did. He took three analyses, three DCF analyses. In the first of those, he took all of the revenues for the first ten years and deducted all of the expenditures. He also multiplied the terminal years' income by a factor of ten, and then he discounted those two values, the sum of the revenues over the expenditures, and ten times the tenth year, I guess ebbit da (phonetic) became a favorite word in Your Honor's courtroom, ten times the ebbit da, and he present valued that to the present. That is a plain vanilla classic DCF valuation of an enterprise. It is not a valuation of an option to buy that enterprise for some stated amount.

Now, in the other two DCF analyses that he did, this is all on Page 11 of his report, he took into account the capital flows, the amount of debt and equity which would be put into the business. That is also a common way of determining the

value of an enterprise through a DCF analysis. And then Mr. Jones averaged the three to come up with the $67 million figure.

Now, clearly, each of the three variants was logically equivalent, that is, each of them was an alternative valuation of the value of the enterprise. In the first of those where all he did was to take the revenues and subtract the expenditures, there's not even any consideration of the capitalization of the company, and he comes out with a range of figures. Your Honor has seen them. They're in the $60, $70 range.

And then he makes two subsequent DCF analyses, and he comes up with alternate estimates of the value of the enterprise. The second two valuations do in fact take into account the capital flows of the company, but they are still valuations of the enterprise which do not value an option to buy the enterprise.

Now, my fourth proposition is that plaintiff's counsel misrepresented to the jury that Mr. Jones had calculated the value of UIH's alleged option or contract rights after deducting the exercise price, or as he put it, the value of those rights over and above the investment UIH was required to make.

Plaintiff's counsel told the jury—this is on 7944 and 45, Your Honor—and I quote, "On the contract damages, UIH is awarded the benefit of its bargain with Wharf," skipping some irrelevancies here, Your Honor, "and that would have been the valuations that Mr. Jones did." That was the second valuation, and that was the $67 million valuation as of that date. Now, keep in mind also, and I'll talk about this on damages, when we use those numbers, 50 million, 67 million, whatever, this is over and above the investment. So if UIH has to put 50 million into the project and the project, let's say, has a value of 67, we mean 67 over and above the 50. So the 67 is the net figure. It would actually be, if you're adding the two together, 117 million minus the 50. "So—so I just want to

make sure that you understand that we don't subtract out the investment. The appraiser already does that."

Plaintiff's counsel repeatedly told the jury that UIH's right to acquire 10 per cent of the Wharf Cable System was calculated by Mr. Jones to be worth $67 million. He also told the jury that the $67 million did not have to be reduced to take account of UIH's obligation to pay the exercise price or what is the same thing, to provide 10 per cent of the equity capital of Wharf Cable.

I respectfully submit, Your Honor, hard as it may be to say, that that constitutes a misrepresentation by plaintiff's counsel of the conclusion which Mr. Jones reached.

Plaintiff's counsel falsely represented that Mr. Jones had determined the value of UIH's right or option to acquire 10 percent of the stock of the Wharf Cable System. In fact, Mr. Jones had done no such thing. All he did was to determine the value of 10 per cent of the Wharf Cable System.

My fifth point can be briefly made. It is simply that in rendering its verdict, the jury obviously relied upon and accepted plaintiff's misrepresentation of the Jones' study. There is, Your Honor, no other plausible explanation for the verdict of $67 million. It is exactly equal to the amount which plintiff's counsel represented to be Jones' estimate of UIH's loss resulting from Wharf's conduct. It is impossible to construe that verdict as having any other basis. The jury obviously did not take Mr. Jones' $67 million figure and reduce it by 50 million or 60 million or whatever to account for the exercise price, and then re-inflate it to the exact $67 million figure.

Indeed, I think your Honor will see that plaintiff's counsel did not introduce any evidence to prove the specific amount that UIH was obligated to invest. Your Honor will search the record in vain for any questions asked by plaintiff's

counsel, asked to establish the amount of UIH's exercise price or investment obligation.

Your Honor, that is the substance of my five point presentation, and thank you for your attention.

THE COURT: Thank you.

MR. JENTES: Your Honor, would you like to have me continue on the punitive damages?

THE COURT: Sure

MR. JENTES: Or have Mr. Chase respond first?

THE COURT: No, I want to handle all of these issues now.

MR. JENTES: Okay, fine.

Your Honor knows by now that I tend to get a little bit off track because I read things and I get interested in them and find some analogies to where we are, and I happen to have been reading Barbara Tuckman's book on the Proud Tower, which is the wonderful prequel, as it were, to the Guns of August, and I was struck, as everybody does who looks at the First World War and its genesis, at the tremendous misunderstandings and misreadings of events that led to that catastrophe.

And it seems to me here in this case, we've unfortunately ended up with a thermonuclear result that bears no rational relationship to any harm that was intended or inflicted, and it strikes me that that's particularly true with regard to the $58.5 million in punitive damages.

In a sense, it boils down to two different approaches in two different societies with two different cultural backgrounds as to what is necessary to make a deal. And I recalled and dug out Your Honor's comments as we were nearing the end of the trial, where you spoke to the cultural differences and you made the following comments. It was at Page 5518. You said, "If cultural sensitivity played any role in

the parties to this transaction at that time that they were engaged in the transaction, they wouldn't be here today." And you continued, again on the same page, "I think Mr. Fung testified about the understanding, the battle of the Atlantic, as he referred to it, which is a misplaced ocean, if not a metaphor. But at any rate, I think he made his point there. That's part of the reason why we have this trouble."

Fortunately, Your Honor, I think that the Colorado legislature in CRS 1321.102, has provided a way out to Your Honor. We have cited that statute and I'm not going to requote it here, but what it does is it gives Your Honor the discretion to disallow in its entirety or to substantially reduce the punitive award, and it does so for three alternative reasons, not cumulatively, but alternative. And I emphasize that they are far broader than the kind of matrix that is involved in the federal or state due process analysis. There are overlays with the federal due process analysis that has been most recently articulated by the Supreme Court in the *BMW* case. But if you look carefully at the Colorado statute, it seems to me that it reaches far beyond that, and the reason is because the Colorado statute is really the result of probably the last 10 to 20 years of what's been variously described as the Tort Reform Movement on a nationwide scale that has led to a number of changes in the approach of state legislatures and courts to the imposition of damage awards and punitive damages in particular. And I think it has been this felt sense among the population that punitive damage awards have gotten out of hand.

And interestingly, as I'm sure Your Honor knows, Colorado actually has been a bellweather in that regard. The statute that they passed, and to which I'm going to address a few remarks, is at the very front cutting edge of that movement. And I think it is reinforced by the parallel provision as it were in 1325.127, where the Colorado statute, legislature, requires that proof to sustain any kind of punitive damages has to be beyond a reasonable doubt. And we've cited, Your Honor, the fact that that is a unique provision in all of the states of the

United States, and I think it reinforces the conclusion that the Colorado legislature wanted to make a major important move with regard to punitive damages.

Now, what I'd like to briefly talk about is why it seems to me that this case presents a clear opportunity for Your Honor to not just apply one, but any one of the three alternative grounds spelled out in 1321-102 for disallowing the punitive damages here.

The first ground is "the deterrent effect of the damages has been accomplished." It seems to me that any deterrent effect that may have been needed in this case, and I'm not admitting that there is, but if there was, it was certainly more than accomplished by the staggering magnitude of the $67 million compensatory award, the addition of $28.2 million in prejudgment interest, and the potential for some, so far, $2.4 million in attorney's fees, which has been the request that UIH has made pursuant to Your Honor's award of punitive damages. And while that matter is off to the side for the moment, if you tote hose all up without taking account of post-judgment interest, we're already up to some 97.6 million bucks.

Now, the fact of the matter is, as the Colorado Supreme Court made clear in *Kirk versus Denver Publishing*, which we've cited to Your Honor, the award of compensatory damages, and particularly of this size, has both a compensatory and an exemplary function. The Colorado Supreme Court said in that case that, "While a compensatory damages award serves the reparative function of making the injured party whole, it also performs the secondary function of discouraging," and now it's quoting from an authority, "a repetition of the defendant's wrongful conduct by serving as a warning to others who are inclined to commit similar wrongs." And as I'm sure Your Honor knows, the award of attorney's fees under Colorado's Securities Act adds to the deterrent effect and is itself a punitive, or at least a form of penalty, as the Colorado

Court of Appeals held in *Ortivas versus Davis*, again cited to Your Honor.

Now, UIH's response to this is that, well, the people at Wharf haven't admitted that they did any wrong. They haven't shown remorse. Your Honor, there's nothing in any of the punitive damages law that I'm aware of that requires the defendant to make a mea culpa in order to challenge the punitive award. In fact, if that was required, we wouldn't have *BMW v. Gore* and cases like that. Obviously, defendants constantly are challenging the awards made against them, feeling that the awards are excessive or shouldn't be allowed for a variety of reasons. In fact, every defendant has the right to appeal and certainly the defendants in this case have the right to appeal.

UIH also made the argument in their sur-reply brief that, well, the amount that's been awarded does not even "dent Wharf's balance sheet." Again, it seems to me that that's off base. The Colorado statute prohibits just such a look because what the statute says is that nothing relating to, and I'll quote, "In any civil action in which exemplary damages may be awarded, evidence of the income or net worth or a party shall not be considered in determining the appropriateness or amount of such damages." That's ground number one. It seems to me if you just stop there, I think Your Honor could respond in the way in which I've asked.

The second ground, however, is "The conduct which resulted in the award has ceased." I really don't see how we've got any dispute about that. The conduct that led to the award all predated the meeting of the UIH representatives with members of the board of Wharf in March of 1994. That's three and a half years ago. And, in fact, as Your Honor knows, UIH took the position that any actions after that were irrelevant, and in fact was successful in getting excluded evidence relating to what has been the actual results of the Wharf Cable operation in subsequent years.

Accordingly, this isn't the kind of a case that generally you're talking about with punitive damages where you have a fear of an ongoing repetitive kind of a behavior. Indeed, this isn't even a repetitive case. Even beforehand, there was only one instance, namely the negotiations between UIH and Wharf. It's also not the kind of a case that raises issues of public health or safety or some kind of a product that is being sent out into the marketplace and causing threats to the health of the citizenry.

What we're talking about here is a purely economic injury, indeed, one that really arises out of an alleged breach of contract, in essence. And there's absolutely no evidence that the isolated circumstances giving rise to this commercial dispute will ever repeat themselves.

Now, UIH tried to suggest that there was some chance of repetition because of the fact that Wharf had dealt with three Colorado companies in the past. But if Your Honor looks at the evidence as to that, the smallest of those companies, the Segagraphics, in the very documents that they appended to their papers, if you look at them, the relationship between Segagraphics and Wharf was extraordinarily fine. Segagraphics was looking forward to dealing with Wharf in the future. There's no evidence of over reaching, or any suggestion that there had been improper dealings with Segagraphics.

The other two companies were U.S. West and TCI, and the evidence in this case shows that they're the ones that decided not to deal with Wharf on the transaction, not that Wharf didn't want to.

The third ground under the statute is "the purpose of such damages has otherwise been served." The purposes behind punitive damages in Colorado, as elsewhere in the United States, Your Honor, are the interrelated goals of deterrence and punishment of the defendant. I've already talked about deterrence. That has been more than adequately accomplished by the compensatory and related awards. And,

likewise, the nearly $100 million that's been awarded apart from the exemplary damages or add-on, plainly meets out adequate punishment.

The figure exceeds any benefit that Wharf received, even under UIH's theory of the case, and in fact as Your Honor knows, the jury found that the maximum value to Wharf of UIH's efforts was only $8.1 million. And I say that because if Your Honor reads the instructions that you gave as to what was the measure of damages to be awarded by the jury if they found on the negligent misrepresentation claim, it was the net value received by Wharf. It's the only one that that was the measure of damages, and the jury returned a verdict of $8.1 million.

Now, I won't spend any time on the other provisions of Colorado law beyond reinforcing what I've already said, that is, if you read the Tenth Circuit opinions and opinions of the Court's in Colorado, I think it's very clear that they only allow an award of exemplary damages when "the acts causing the injury were performed with an evil intent and with the purpose of injurying the plaintiff." And I'm citing to *Aralias versus Stevenson* form the Tenth Circuit 1994, again quoted in our brief. Indeed, as I pointed out, Colorado is the only state that requires that such an evil intent or wrongful motive be proved beyond a reasonable doubt.

Now, I'd like to spend only a moment on *BMW versus Gore*. It seems to me that what *BMW* informs us of is that the United States Supreme is clearly concerned and increasingly so about runaway punitive damages. And after tip toeing around the issue, for the first time in *BMW*, the Supreme Court actually held that a particular award in that case, $2 million, by the Alabama courts violated due process and needed to be set aside.

I'm sure Your Honor has read the case and I'm not going to argue it at great length, but what I think is very clear is that when you look at the decision, there are a couple of crystal clear points. One is that you may not impose punitive

damages in Colorado for actions outside the state of Colorado. It is not the function of the Colorado legislation or the Colorado civil justice system to punish somebody outside the state for things that they did outside the state. And yet when I reread Mr. Chase's closing argument as to what he cites as being the problem here, it's all things that occurred outside Colorado.

Now, UIH tries to get around that point by making the argument, and this I'm quoting from, "This case concerns the misconduct of a single actor, Holdings, directed at a single victim, causing injury to UIH in Colorado and thereby affecting the Colorado economy and giving Colorado a basis to punish Holdings." This is in their sur-reply, Page 2.

If you think a moment, that argument cuts against UIH. It's sort of talking about a weighing, and if there's any weighing to be done, all of the services that were to be performed, everything that was supposed to benefit anybody, was all to take place in Hong Kong. The defendants don't do any business here. They're not residents here. The actions that are the core of this case are 98 or 99 per cent, whatever number you want to pick, all outside the state of Colorado. And I think that what makes it particularly troublesome is because of the fact that we are dealing in the international realm. This is not even reaching out within the United States. This is reaching out to people who are under a different legal system in a different country, and I don't think that's what the Supreme Court permits under *BMW*.

In fact, if you look at the *BMW* standards, there is a critical factor as to whether or not you compare the punitive damages award and the civil or criminal penalties that could be imposed. And here, as we point out in our brief, the Colorado Securities Act provides that even a willful violation of that act may be punished by a fine not to exceed $750,000, a very crucial fact, it seems to me, in this case.

Lastly, Your Honor, before I leave *BMW*, I'd like to touch for a moment on Justice Briar's concurring opinion, because in certain respects, I think it is more revealing than Justice Steven's majority opinion to which the other justices all subscribed. Justice Briar's concurring opinion in which Justice O'Connor and Justice Sutor join, digs at the real problem of punitive damages. What he's really saying is we just have to provide some kind of meaningful standard as to what people can know they're going to run into these kinds of bonanza grants. The legislature has to do that. The courts have to do that, or otherwise, the jury has no idea what the heck it's supposed to be doing. We're sending the juries off to—when I read Mr. Chase's closing, he devotes 15 lines to exemplary damages. He gives them no guidance at all as to how they're going to arrive at $58.5 million or any other number. And I just don't think that that's what the Constitution of the United States requires.

Lastly, Your Honor, even if this Court believes that some exemplary award is in order, it strikes us, having read the *University of Colorado Foundation versus American Cyanamid* case, there was a case–

THE COURT: It's a brilliant decision, by the way.

MR. JENTES: It was well articulated, perfectly reasoned. But what struck me, Your Honor, is Your Honor obviously–

The Court: Tell that to the Court of Federal Appeals.

MR. JENTES: Your Honor obviously feels that *American Cyanamid*, you talked about the cynical disregard of these plaintiff doctors, scientists, you talked about pillaging the doctor's invention as so much bootie, et cetera, and yet on a compensatory award of $44.4 million, Your Honor only awarded $500,000 to each of the two doctors, for a total of a million dollars. And while in no sense do I suggest that that's what you ought to do here, I believe that what you ought to do is disallow the punitive award under the statute, in light of the

other awards that have been imposed. But I find it difficult to reconcile this award with anything more than was done by Your Honor in *American Cyanamid*.

THE COURT: Well, that was my response to the *BMW* case basically.

MR. JENTES: Yeah.

THE COURT: It's a different theory entirely.

MR. JENTES: Yes, I understand. That's why I said we're in an area here where I think the courts are reaching out, grappling, they're struggling to figure out what to do with this problem, and as I say, and I don't want to beat a dead horse, I think the Colorado statute has given Your Honor the means to do things. I think that the right thing, the just thing is to disallow the punitive damages.

In any event, that's all that I have. There are obviously other issues that we raised on both compensatory and on punitive damages, but as I say, I don't want to take an undue amount of time. We're happy to answer any other questions.

THE COURT: Thank you very much.

MR. JENTES: Thank you.

MR. CHASE: Good morning, Your Honor.

THE COURT: Good morning.

MR. CHASE: Jeff Chase of Jacobs, Chase, Frick, Kleinkopf and Kelley on behalf of the plaintiff.

Your Honor, I'm going to be mercifully brief. I almost said short, but I do recall some of the repartee that went on with that.

THE COURT: Mr. Jentes didn't talk about your tie, and I know it's not Friday, but what comments do you have, Mr. Jentes, on this tie?

MR. JENTES: Well, it is so subdued, Your Honor, I was stunned. I mean, I don't know whether he's decided that he's got such a shock value with all this hirsute display above the neck that he doesn't need to go, but this is modest, as Your Honor knows.

THE COURT: The Beau Brummel of the court is gone.

MR. JENTES: Yes, correct.

THE COURT: Yeah.

MR. JENTES: It must be Ralph Lauren or something.

MR. CHASE: I'd also like to point out, Your Honor, that although I may be in bad need of a shave, Mr. Jentes has shaved his moustache, which proves my theory that there's a net amount of facial hair in the world, and what he loses, I gained, and so nothing's lost.

I'm going to be very brief. I'm going to talk first about what Mr. Dodyk had to say here. And before I do, though, I want to put this in a framework, because Your Honor's remarks at the beginning of this hearing about how we don't have new trial motions very often out here, there's a good reason. You don't retry the case in a new trial motion, which is exactly—exactly what Mr. Dodyk is trying to do.

The issue today is what did you do wrong? What did the judge do wrong at the time of the trial. Where is the error? These guys don't like the result, I understand that, but where is the error? And I want to quote from something that Judge Babcock was quoted as saying in a case called *Lyons versus Jefferson Bank and Trust*, because I think it's appropriate and I think it's exactly what's going on here.

In that case, the defendants came in and tried to raise a whole bunch of stuff on the new trial motion that had never been raised in the course of the trial. Judge Babcock said, "Defendant's motions are obviously filed by new counsel—thank you, Mr. Dodyk for showing up—in a blatant attempt to

belatedly inject new issues into the case at the district court level, hoping that these issues may be preserved for appeal. Despite this dispositive deficiency in defendant's motions, I will address the merits of the matter presented in the interest of a complete record."

Well, Your Honor, I submit that before we ever even talked about the merits of this compensatory damage issue that Mr. Dodyk raised, we'd have to come to grips with a couple of things. First of all, why did the issue of damages ever get to the jury in the first place? Was there some objection to the issue of damages getting to the jury in the first place? Answer? No. Why weren't all these brilliant expert points about GAP and SAP and SLAP and whatever, why weren't they brought out on cross-examination by Mr. Munson? Were they? No. Why weren't all these points brought out by Mr. Carey, the expert for the defendants? Were they? No.

Why wasn't Jones' testimony objected to in toto with a motion to strike the testimony? Did it happen? No. Why, when Mr. Tully got up at the end of all the evidence in the case and moved for a directed verdict, did he not once mention anything about these theories that Mr. Dodyk is presenting here for the first time in this context? The answer is he didn't. And the answer is nobody did anything. There was no error, there was no nothing, and the real answer as to why that is, it's not because the lawyers representing Wharf weren't on their toes. It's not because they weren't competently represented by one of the largest law firms in the world. The answer is because what Mr. Dodyk is saying is dead wrong.

Now, I'm not going to stand here and retry this case. Your Honor doesn't want to hear that, and I don't want to do it. But let me just say when he stands here and tells you that Jones did not value an option, he is dead wrong. He is selecting from that transcript what he wants to select from that transcript. He is disregarding what Jones said, and that was this is how you would value this option. But then Bowles comes in, Bowles

comes in and says the exact same thing and says it over and over again, and where is Mr. Dodyk's reference to that? Not here. He wants to retry the case but leave out my side of the case.

Second point, I misrepresented to this jury that the value of $67 million was over and above the capital contributions that UIH would have to make over the course of the program. Well, for a moment, let me assume very arguendo that that happened, which it did not, where was the objection? Where was the motion to strike? Where was anything that would have created error that we could be talking about here in a rational way? It didn't exist. It didn't exist not because these lawyers weren't on their toes. It didn't exist because they know what the facts of this case were, and the facts of this case, if you look at Jones' report, if you listen to Jones' testimony, if you listen to Bowles' testimony, even listen to Carey's testimony, the facts of this case, the value of what UIH was deprived on a net basis, net, was $67 million. That means the value computed after you take out what UIH would have had to put into the project in terms of its capital expenditures and costs. That's the evidence of this case.

But even if we were wrong about all that, I mean if I was smoking funny cigarettes over here and doing all kinds of crazy things, and we were wrong about all of that, and we're not wrong about any of it, what does he do about the breach of fiduciary duty claim? The breach of fiduciary duty claim says to the jury you can consider anything—I forget the exact instruction, but it basically tells the jury look to what Wharf got out of this thing. And you could put all this aside. You could decide Jones was crazier than a Christmas goose, you could conclude all that, there was enough evidence in that record that Wharf got itself a cable T.V. system worth hundreds and hundreds of millions of dollars through the efforts of UIH, and that jury was certainly free to conclude that $67 million falls within the ambit of hundreds and hundreds of millions of dollars.

Let me talk about punitive damages for a minute. First of all, let me talk about this statutory reduction, the three things, deterrence, the conduct ceased, the purpose was otherwise served. With all due respect to Mr. Jentes, and I do have a lot of respect for Mr. Jentes, what a bunch of bunk. There is no evidence anywhere that any of these things are true, other than counsel getting up and saying them.

What this record does reflect is the exact opposite is true, that Wharf hasn't learned a darned thing from what happened in this case, that Wharf needs to become upside the head, there needs to be significant deterrence. And how do we know that? Well, we know that for about three months, we had a trial in this courtroom, and Wharf put out a lot of witnesses and they lied, and that jury sat there and they found that they lied. They had to find that they lied, and they lied big time, and they synchronized stories and they contradicted depositions, other testimony under oath. Does that sound like somebody that has learned their lesson? No remorse whatsoever.

I mean, if you look at the press reports, or whatever, Wharf is talking about this is the result of a crazy United States judicial system that just can't be understood. The press spin that they're putting on it, and Mr. Wilson is going to talk about this when we get to the next motion, the collection games that Wharf is playing. I wish I had my timeline out here, because I would be able to add another block, and that is what's going on now. What's going on now, and Wilson will address this, is a massive shell game worldwide where we are trying to get assets to satisfy the judgment we've got, and they're coming into court saying, hey, don't let them do it, and by the way, we don't want to bond this thing either, and we get special treatment because we're rich. And that's essentially the guts of their motion, but I'll let Wilson deal with that. There's no basis for a statutory reduction.

Let me talk about the two *BMW* factors that Mr. Jentes addressed. First *BMW* factor is that the conduct—*BMW* says

does your state have a legitimate interest in punishing this conduct, and look to the actions that occurred in your state or affected your citizens. Now, remember what they said in *BMW*. They were trying to punish *BMW* for actions that didn't occur in Alabama or affect their citizens. Well, what we've got here, this is an easy case, first of all, a lot of activity did occur in Colorado. Stephen Ng comes out here October 8th, grants the option. You've got Fung coming here working on this slow roll that they're going through. You've got all kinds of things being done in Colorado towards the preparation of that system. But even if you had nothing going on in Colorado, you've got Peter Wu and his minion sitting over there in Hong Kong lopping mortar shells into Colorado in terms of, look, Stephen, get expertise, don't give them any interest in the system, and I know they're not consultants. Therefore, you have to lie.

And so Stephen Ng shows up, and don't get me wrong, the record does not say it that well, if it did, we'd have had a shorter trial, but the net effect of it, and essentially what the jury would have had to sort through and conclude is that's exactly what happened. Stephen Ng comes over here and he lies. I don't care where it took place. You know, we've got trials going on in this building about a bomb that blew up a courthouse in Oklahoma. I don't know where that bomb was prepared. I don't even remember what the evidence was. But if we had a civil case in here on that claim and someone said this bomb was made in Kansas, and so Oklahoma has no legitimate interest in punishing the conduct, because all it did was blow up there, I think Your Honor would take a very dim view of that kind of argument. Yet that, in effect, is the kind of argument that Mr. Jentes has just made.

The second *BMW* point, civil penalty, 750,000 on securities fraud. We've got the case here in the Tenth Circuit, the *Continental* case, which addresses that very point, Your Honor, where they said—what is the name of the case—*Continental Trend*, where the court said, look, you can't compare common law claims like fraud, et cetera, the things

that we've got, to statutory penalties, and the Tenth Circuit pretty much put that one aside in that case, and I submit that's exactly what we're talking about here.

The issue is notice. The issue is notice. Did they have notice? And as the court in *BMW* said, it said first and paramount, look to the reprehensibility of the conduct. Now, we can sit here and jaw about was this a misunderstanding, was there some cultural confusion? What's going on here? But we don't have to do that any more. They did it. The jury heard it all and they got all the arguments about how this was a misunderstanding. And what did we prove in this case? What we proved in this case was that there was a cynical and diabolical lie from Wharf to UIH so as to take everything UIH could give, credibility, services, everything that they had to give so Wharf could get its license. And when it had it, it told UIH to hit the road. And then when it told them to hit the road, it did it in the most games playing and cynical way you could.

What we proved here was a serious, serious fraud, and we proved serious injury to a vulnerable company, and that, Your Honor, is deserving of the maximum punitive damages allowed by law. That would be three times the amount of the compensatory if I had made a petition under the statute, which I have not, but the one to one ratio that we have been awarded is well within the conduct that should be punished in this case.

Thank you, Your Honor.

MR. WILSON: Your Honor, if we could reinstitute the tag team rule and if I could be heard just very briefly? David Wilson of Holme Roberts.

THE COURT: Go ahead.

MR. WILSON: One thing that I want to make sure is clear is that the measure of damages on the fraud based claims required the jury to find the difference in the value of the property as represented, and the difference in the value of the

property as it actually was, the property being the option, because that was the fraud in October of 1992.

Mr. Jones valued the option, as Mr. Dodyk quoted from his testimony, he says he valued the option. Mr. Jones also testified that he netted out the figure—the figures concerning which he testified were net numbers.

Now, where Mr. Dodyk is just plain wrong has to do with the valuation in March of 1994. The issue there, and the jury was instructed in the breach of contract claim to award UIH the benefit of its bargain for breach of the contract. The contract in this case was the option. Wharf breached its obligations under the option.

What did the option entitle Wharf to do—or obligate Wharf to do, rather? It obligated Wharf to convey to UIH a 10 per cent interest in the cable project. Therefore, and we've pointed this out in our briefs, but I don't want it to get lost in the scrap here today, Mr. Jones, in coming up with an enterprise value of the cable project as of March of 1994, was exactly what he was supposed to do, and it was exactly what he was—and the jury followed those instructions in awarding the $67 million in damages.

Thank you, Your Honor.

THE COURT: Okay. Mr. Dodyk?

MR. DODYK: Your Honor, first let me say with respect to the waiver question, there is no question that Wharf counsel raised the problem that was created by the fact that Mr. Jones had valued a 10 per cent stockholding in Wharf Cable, and that that valuation was not consistent with the claim—was not consistent with the option formulation of the case. And if I may, I'll read from 8035 of the transcript where Mr. Munson in his closing says, "Plaintiff's complaint alleges only an option to buy 10 per cent of Wharf Cable. That's what the cable alleges, only an option to buy 10 per cent of Wharf Cable. Now, we know from the testimony of Mr. Carey that an option

to buy something is different than ownership. And when there is an option, there's a whole bunch of other certainties between the fact of the option and the fact of ownership. What we know in this case is that there's only one person who valued the option in this case, and that's Mr. Carey. There is not any plaintiff witness at all who actually valued the option that's claimed in this case in the amended complaint in Paragraph 54." And he goes on. He repeats that. So I don't think there is any basis for saying that the issue, Your Honor, was not raised.

Now, I have a little bit of difficulty putting together two plaintiff's counsel's statements, because it seems to me that Mr. Chase was saying, well, he did value the option, presumably meaning that he did deduct the exercise price, and then Mr. Wilson getting up and saying, well, he did exactly what he was supposed to do, he was supposed to value 10 per cent of the stock of Wharf Cable. Those two are flatly inconsistent characterizations.

Now, Mr. Wilson goes on to say, well, Your Honor, it's different in the fraud claim than the breach of contract claim, because all they have to do is prove the difference between the value of the right as represented, and the value of the right as it was. And that is what the instruction said following the recognizable federal pattern instructions. But the problem is that Mr. Wilson has badly misconstrued what that instruction means.

We all agree that the value of the thing as it was was zero, because the option was never permitted to be exercised. The value of the thing as represented is the difference between the value of a 10 per cent stockholding in Wharf Holdings and the price which UIH would have had to pay in order to exercise that option.

Therefore, it's Jones minus 40, 50, 60, $70 million, whatever that may be, and Mr. Wilson's attempt to justify what he said Mr. Jones did is not consistent with the proper meaning

of that instruction, and is, as I have pointed out, inconsistent with what Mr. Chase has said.

Now, as to what Mr. Chase said, you'll note that he didn't point to any specific aspect of the Jones' study, any specific aspect of the Jones' testimony. I went through the Jones' testimony. I went through the report. And Your Honor will see that on its face, it purports to be nothing more than a valuation of a 10 per cent stock interest in Wharf Holdings.

And, Your Honor, I respectfully submit that we're not talking about advocacy here. We're not talking about advocacy, because what Mr. Chase has said goes beyond advocacy. There is no responsible investment banker in the world—no responsible investment banker in the world who will tell you that the Jones' study is a valuation of an option to buy 10 per cent of the stock in Wharf Holdings for 50, 60, $70 million, whatever it is. They will tell you that it's what it purports to be on its face, the valuation of a 10 per cent stock interest.

In a sense, Your Honor, the response I think sharpens the conflicts here, and I am referring to Mr. Chase's part of the response, not Mr. Wilson's, which I think is a little confused, because Mr. Chase is before this Court telling you here today that what Mr. Jones did was to value the option, and there is no conceivable way of supporting that position—no conceivable way. Perhaps if Your Honor is so minded, Your Honor could appoint an expert from the investment banking world, someone who has got a reputation whom Your Honor trusts to take a look at the Jones' report and see if it's anything other than what it says. I don't think you have to do that because both the testimony and the report say plainly, and so does Mr. Bowles say the same thing. They are valuing a 10 per cent stock interest in the company. In fact, even Mr. Wilson is taking that position here this morning.

Now, as far as the waiver goes, apart from the fact that Mr. Munson clearly preserved the issue, what I have to say,

Your Honor, is what we're dealing with here is, number one, a plain misrepresentation of what the Jones' study was. Your Honor, I submit that that is a 60(b)(3) ground for relief from the judgment, as to which arguments of waiver are irrelevant.

Thank you, Your Honor.

THE COURT: Thank you.

MR. CHASE: Your Honor, may I say something before we get the reply on punitive damages, since I've been called a liar by Mr. Dodyk?

He just referred to Rule 60(b)(3), and there's no Rule 60(b)(3) motion on the table here. That's one thing. Number two, for him to come in here and say that what we're doing is beyond advocacy, based upon the record in this case, I think illustrates what I was just trying to say earlier about Wharf has not learned its lesson.

Thank you, Your Honor.

THE COURT: Mr. Jentes?

MR. JENTES: I've said everything I can. I hope that Your Honor will take appropriate action on the punitive damages.

Thank you.

THE COURT: Well, all right. First of all, I think it's necessary to point out that this was indeed a jury trial, and the record on the instructions given to that jury has already been made, and I cannot emphasize enough the fact that it was a jury trial, and what I consider to be a judge's obligation, perhaps that's too mild a word, a judge's compelling duty to respect the jury's determinations, unless there is some kind of fraud or egregious violation which suborns the validity of a jury verdict.

And it happens more often than I would care to comment about, but nevertheless, it does happen sometimes. Again, I don't want to misrepresent, because for the most part,

I find myself in complete agreement with jury verdicts, but there are times when a jury does something that I might disagree with, and yet I feel bound to respect. And the case that was cited, which I wrote involving *American Cyanamid and the University of Colorado* represents a different kind of struggle entirely. It's one where there was no jury, and where I was trying to sort out some sort of best use of provisions for punitive damages in those discrete circumstances. But the law in this circuit is very clear, and I don't think the *BMW* case has any effect on it, that we are still dealing in jury trials with ratios, and the *Big O Tire* case is the guiding case in this circuit on the issue of punitive damages. This was a one to one ratio, which is well within the province of the jury.

With respect to counsel and what counsel says in argument, there's a couple of things I need to point out. First is that this jury in this case, as in all the cases I try, was repeatedly instructed from the voir dire examination throughout the trial that the comments of counsel are not evidence, and more importantly, I encourage spirited advocacy in trials, and we saw that in this case. I did not see any indication at all of any subverting or suborning of the integrity of the jury or its verdict in this case.

The other aspect of it is that points were raised in argument and there was ample opportunity given for rebuttal, and how much a jury accepts of counsel's comments or arguments throughout a case is not determinative in view of the instruction that counsel's arguments are not evidence of the verdict which a jury renders according to the instructions that are given. But I also look to see, in view of these motions, my own review of the transcript, and I looked at Mr. Munson's cross-examination of Mr. Jones, and I think that that's one of the things we need to bear in mind. I've sat in the past by designation with the Court of Appeals and I know it's a very, very difficult thing for appellate judges to do and for appellate lawyers to do, and that's to put themselves into the position and place of the trial itself.

And there's a temptation in post-trial proceedings, whether in this court or in the Court of Appeals, to search for perfection, and that's not what trials are about, to search for exactitude, and that is rarely what trials are about.

We're dealing with questions of preponderance, of likelihood, not of precision. And we have to remind those looking at a jury trial in this system that the danger is one of a jury becoming impassioned to the point that reason cannot operate, or a jury being corrupted by prejudice or some other outside influence. But we have to place the evidence in the context of the trial and see what was being communicated, and it isn't necessarily reflected by a review of the cold transcript.

And in this case, I think this is a perfect illustration of it, because what Mr. Munson was trying to do, as I see it, in his cross-examination of Mr. Jones, he was—it had nothing to do with what should be deducted from $67 million, and I don't think that's a question of waiver. It's a question of what the jury was listening to, and what Mr. Munson was doing was cross-examining with respect to what I will call, and I think he did, the pre-conditions to exercising the option, in other words, board approval and financing, and he didn't argue a dollar amount should be deducted from the 67 million. He didn't question on that point at all. He argued that there was no interest at all to value, and that was the thrust of his examination.

And, indeed, it was the conclusion of the defendant's expert, Mr. Carey. That's the message that was being given to the jury. And if there were a, God forbid, a retrial of this case, it could well be that Mr. Munson or somebody else would be examining a jury—or examining a witness in front of the jury from an entirely different perspective, but that's the give and take of a trial, and that's why objections like this, or allegations like this, have to be viewed, in my view, with extreme care by an appellate panel.

And it may be perhaps to caustic to say, but it has been said by others, that an appeal is the process by which somebody goes around the smoldering battle field and shoots all the survivors.

This jury was very knowledgeable and very perceptive in this case, and they had some choices to make which were very clearly and in my view very competently presented to them. It's the kind of a case that should be tried to a jury, and I will not disturb their verdict in the absence of a sense on my part that something more than a different approach was necessary.

As to the punitive damages, a point which has not been made directly yet, but I think it needs to be made, is that—well, there was reference to the idea of—that my observations about two different cultures and the cultural insensitivities on both sides, which produced this litigation. One of those concepts which I was alluding to is the idea of the concept of face or loss of face, and I think others mentioned it, or alluded to it. And one has to look at UIH in a competitive overseas market in Asia and elsewhere, in other countries, and see what I think justifies the punitive damage award here, and that is that the treatment as the jury found of Wharf and its personnel with respect to UIH was one of utter disregard of the stature and the ability of that organization to do business in the sophisticated environment of international business. And that has an effect, a very clear one, on this particular locality and the ability of businesses here to compete in that environment.

So I don't find the punitive damage award to be shocking. I may have done something different, but I wasn't the finder of fact, and my respect for the authority and the province of the jury in this system is such that I'm not going to interfere with it. I therefore, deny the motions.

Now, let's take a recess and we'll come back for the review of the objections to Judge Pringle and these post-judgment matters.

We'll be in recess about 15 minutes.

(10:30 a.m. - Recess accordingly.)

(at 10:48 a.m. on October 23, 1997, with counsel for the parties present, the following proceedings were had:)

THE COURT: Please, be seated.

Let's go on this now. There's one issue that I want to direct your attention to. It is a lacuna in the briefs that UIH does not respond to the argument urged by Wharf that when a Magistrate Judge exercises additional duties jurisdiction under 28 USC 636(b)(3) that the District Court "retains the ultimate responsibility for the decision that's made." And, you just don't touch on that issue in your briefs. So, I think I need you to talk about that. Now, I don't have any other questions. I think the briefs are very good, but I'd like to hear your argument on the rest of the matters that are raised.

And, I also probably should take this occasion to tell you that if I'm not in the best of moods with regard to this case, I think you are all responsible for having Colonel Gilmore announce his retirement, and he's not going to be here at the Court. I was going to say he's not going to be with us any longer, but I think that's pushing it too far.

MR. JENTES: How soon?

THE COURT: But, you wore him out.

MR. JENTES: How soon?

THE COURT: January 2.

MR. WILSON: Well, congratulations or condolences. I'm not sure what to say.

MR. CHASE: Your Honor, to whom do we appeal your rulings after this?

THE COURT: I don't know. I don't know what the juries are going to do anymore. But, we're going to miss him.

Okay. If you're ready?

MR. DODYK: If Your Honor please, I'll be brief on this subject. One point of order that I have at the beginning, however, and that is that, as we walked into Court, we received this submission which consists of two affidavits and some exhibits which refer to proceedings in California and New York and obviously we have not had the opportunity to review or respond to any of the material contained in it.

THE COURT: I saw that it was filed, too, and we won't—if you look at them and based on my rulings today and anything else, you can respond to them later.

MR. DODYK: Thank you.

THE COURT: But, we won't go into it today.

MR. DODYK: All right. Thank you, Your Honor.

THE COURT: All right.

MR. DODYK: That being the case, I submit to Your Honor that the questions which are presented before the Court are basically questions of law. I think, Your Honor, that there are, as we have argued, three independent bases which counsel against granting the turnover order in this situation.

First of all, Your Honor has seen our briefs with respect to our view that the Colorado turnover statute could not be applied extraterritorially. That is to say what UIH is asking Your Honor to do is to issue a mandatory injunction which requires people in Hong Kong to take actions. That is the very definition of extraterritoriality. And, as Your Honor is aware, the cases hold that all laws, State and Federal, are presumed to be applicable only within the territories of the United States. The fact that Your Honor has in personam jurisdiction over Wharf, I think, is not relevant to the question of whether or not an order should be issued requiring Wharf to take actions in Hong Kong; indeed, you couldn't have an extraterritoriality

question without in personam of jurisdiction over the foreign party because the issue would never arise.

Secondly, Your Honor, I think the cases make clear that the tradition and the policy in the Federal Courts with respect to the enforcement of money damage judgments is to remit the money judgment creditor to self-executing remedies in the nature of attachment, execution, garnishment, and to refrain from using the Court's injunctive powers to seek enforcement of a money judgment. In fact, Your Honor, the *Markarian* and *Hilow* cases go further and state that that remedy should be allowed only in exceptional circumstances and further that those exceptional circumstances do not include the foreign location of assets or the alleged uncooperativeness of the defendant. So, we have the 1st and the 9th Circuits squarely saying that the kinds of issues which are being raised before Your Honor are not sufficient ground to depart from the normal execution remedy. We have also, Your Honor, I think, demonstrated that the Courts fairly uniformly regard orders of this sort as mandatory injunctions. And, therefore, all of the requirements which are applicable to the issuance of a mandatory injunction apply to this particular turnover order.

And, as we have said, the plaintiffs in this case have made no showing upon which this Court could enter an injunction. The facts until this submission today came in the form of statements made unsworn, self-serving in plaintiffs' briefs. Obviously, not a basis upon which this Court could enter the findings of fact required by Rule 52 or grant an injunction.

More fundamentally, I suggest to Your Honor that there is no possibility here that defendants can show that a money damage remedy is inadequate. That is to say that there is no legal remedy applicable to this circumstance or that they can show any irreparable harm. The one fact which is incontestable is the fact that Wharf does have assets which are more than sufficient to meet this judgment and given the nature

of that enterprise, being a large publicly-owned corporation in Hong Kong with vast physical assets, there is no possibility that those assets are going to evaporate at any relevant time.

That being the case, I suggest to Your Honor that there is no reason in these circumstances not to require UIH to pursue the normal remedies of execution and attachment. I would also say to your Honor that we've just begun the discovery process. We have just encountered some instances of enforcement. We have at the moment four separate ways of discovery to which we have to respond so that the plaintiffs are not in any position to make any representations to this Court at this time as to what will be the outcome of the discovery or the domestic enforcement proceedings now pending in New York and California.

Therefore, I urge Your Honor not to grant the request that a turnover order be granted on those several grounds and also ask that if Your Honor's decision is to turn in any measure on the allegations concerning the enforcement proceedings in the other fora that we be given the opportunity to respond.

Thank you for your attention, Your Honor.

THE COURT: Thank you.

Mr. Bauer, you're noticeably silent this morning, but your presence isn't.

MR. BAUER: Thank you for noticing, Your Honor.

MR. WILSON: Your Honor, if it please the Court, I guess I ought to begin with Your Honor's question as to Magistrate Judge Pringle's additional duties, jurisdiction, and how that affects the Court's review. And, I'll be very candid with the Court; that's not something we'd looked at because we interpreted Your Honor's order granting the stay in response to Mr. Bauer's motion and setting this hearing today that Your Honor essentially was agreeing with Mr. Bauer's construction

of the Federal law. And so, it's not something we took a position on.

THE COURT: Well, I'm sorry, that's not the reason why I granted the stay.

MR. WILSON: Well, Your Honor, I mean, we'd be happy to respond on that point, but I'm not prepared to do it today. I mean, in all candor, Your Honor, we believe that whether the Court simply affirms Magistrate Judge's order based on—regardless of the standard that the Court applies in reviewing Magistrate Judge Pringle's order, we believe that that order should be affirmed. So, if it please the Court, Your Honor, I'd like to go and address the merit of why we're here really.

THE COURT: All right. Go ahead?

MR. WILSON: I mean, the bottom line in this case is that we've got a judgment which these people refuse—which Wharf refuses to pay. We haven't collected and we've tried to collect. Immediately after the entry of the judgments, we propounded Rule 69 interrogatories and request for production to Wharf Holdings, and then a little bit later on, we propounded a similar set to Wharf Communications. And, in various different ways, we asked these judgement debtors what do you got? Tell us what you've got. And, they responded essentially that we have three types of assets. We have bank accounts, we have the stock of our subsidiaries, and we have trademark registrations. In response to that, we began garnishment proceedings in New York City to go after the only two identified U.S. bank accounts which were with the Hong Kong and Shanghai Banking Corporation in New York, and we've been able to levy on about $60,000 which, as I understand it, is restrained, but has not yet been paid. I will assume for the purposes of the argument today that that amount is undisputed, and if Mr. Bauer or Mr. Dodyk disagree with that, I would ask them to tell us if they do have a dispute.

The other two things that we've done are, number one, after getting this Court's order allowing us to register the judgment on an expedited basis in other Districts, we went and we registered the judgment in the District Court for the Central District of California and also in the Northern District of California trying to go after the proceeds of this hotel sale from Wharf's hotel in San Mateo, California; got orders from Chief Judge Letz (phonetic) in Los Angeles which is signed—which under a California law which I do not purpose to understand are assignment orders and it basically entitle us to those proceeds and to some other things. The bottom line is what Wharf now claims—and, this is evidenced by the affidavit that they filed in their reply brief which Mr. Bauer, I think, submitted on Monday—that we're not entitled to those monies. That this money really belongs to a subsidiary of Wharf called Omni-San Mateo Management Corporation, the orders were improper, they were issued without jurisdiction, and on and on and on.

In New York, we have also commenced a proceeding to try to levy on the proceeds of what's called an interest rate swap contract between Chemical Bank, now Chase Manhattan Bank, and a subsidiary of Wharf called Krikler, K-R-I-K-L-E-R, Limited. Under the contract, Wharf Holdings was entitled to receive the payments which are made twice a year under this interest rate swap deal. We have restrained those proceeds, and Wharf through their attorneys, Cleary-Gottlieb in New York, have entered an appearance and are now contesting UIH's entitlement to any proceeds under that contract claiming, number one, the proceeds never belonged to Wharf Holdings; and, number two, that even if they did belong to Wharf Holdings, on the day the jury returned its verdicts in this case, April 29, 1997, Wharf switched the entitlement of those proceeds from itself to another wholly-owned subsidiary called Wharf International Limited.

Now, Your Honor, in response to Mr. Dodyk's or Mr. Bauer's or whoever was the author of the reply brief that—you know, in an opposition to the declarations that they

prepared, we went out and we got declarations from our New York and California lawyers concerning the status of the California and New York collection proceedings. And, Your Honor, I tendered those to the Court today, and if the Court believes it necessary to consider those in making a ruling on these motions, then obviously we don't have a problem if they want to submit counter-declarations or whatever Your Honor thinks is appropriate.

But, let me make a point here. Whether or not we are successful in collecting in California and New York or whether Wharf is right and we're not entitled to a dime of the proceeds from the New York proceeding or from the sale of the California hotel, whether we win 100 per cent in New York and California or we lose 100 per cent, the bottom line is that we have nothing else to go after and collect from in the United States. Absolutely nothing. We can take our judgment, we can register any place from Maine to Hawaii, and based on their discovery responses, there's nothing else for us to go after. Now, if we collect 100 per cent of what we are now—even have an argument that we can go after in New York and in California, my best estimate is that we will have collected, at most, 20 per cent of the judgment.

This is a case, Your Honor, where proceeding along with normal collection remedies, whether it is a writ of execution or any—proceeding along with a writ of execution is not going to work because there's no property for us to exercise on. Now, Mr. Dodyk says, well, but Wharf is a very rich company. They have all of these nice pieces of property that UIH can go levy against in Hong Kong. There's a problem there. Number one, there is no tree, rule, or anything else that would make this Court's judgment in this case automatically enforceable in Hong Kong. Rather, we would have to go into Hong Kong and essentially try to convince the Hong Kong Court to honor this Court's judgment and to issue a Hong Kong judgment based on this Court's judgment. Wharf has taken the position in documents that it's filed with the SEC that the

enforcement of U.S. judgments, and particularly U.S. judgments rendered under the federal securities laws, is uncertain as to Hong Kong. And so, if what Mr. Dodyk is saying is that Wharf will not oppose the entry of a Hong Kong judgment against it in the full amount of this Court's judgment plus interest, then I suppose that would be one thing. But, what Mr. Dodyk will do or Mr. Dodyk's compatriots in Hong Kong will do the moment that UIH institutes proceedings in Hong Kong is to claim that this Court's judgment was the product of prejudice, an out of control jury, and undecipherable musings of uneducated people—I think is one of the things that they've accused us of—and they're going to take the position that this Court's judgment should not be honored in Hong Kong and, therefore, is incapable of enforcement there.

Now, that leaves us with an alternative and it's State law and it's the remedy provided under Colorado Rule of Civil Procedure 69(g). Now, Mr. Dodyk in their reply brief that they filed on Monday made some very harsh statements that UIH has distorted Federal collection law beyond belief or, you know, words to that effect. I mean, they're just—nothing could be more wrong. If you look, Your Honor—just look at Wright & Miller—this is Section 3012, Pages 148 and 149 and I've go ta list of supplemental authorities which I can tender if the Court pleases—the Professors Wright and Miller say, "State law controls the procedure on execution and in proceedings on and in aid of execution. It controls also in proceedings supplementary to and in aid of a judgement such as garnishment, arrest, mandamus, contempt, and the appointment of a receiver. The District Court has a least as much authority to aid judgment creditors in supplementary proceedings as a State Court."

The Courts have consistently rejected the argument that Wharf is advancing that, oh, boy, if you can't have a writ of execution, I guess you can't collect. We've cited the *Grenada Bank* case from the 5th Circuit, Page 3 of our brief that we filed last week; *Laborer's Pension Fund* case and the

Resolution Trust cases from the 7th Circuit cited at Pages 4 and 2 of our brief; the *Merrill Lynch Relocation Management* case from the 9th Circuit cited at Page 4 of our brief; *Clark v. Wilbur* which is a District Court case cited in Magistrate Judge Pringle's order; and, we've got a couple of new cases. There's what's called the *Matoes* case from the 7th Circuit which I could provide a citation for Your Honor, as well as a case called *Interpool Ltd.* from the Southern District of New York. Each of these cases hold that when you're looking how to enforce a judgment, a judgment creditor is entitled to rely on State law procedures such as garnishment, attachment, where applicable, a turnover statute and other remedies in order to be able to enforce the judgment.

Now, Wharf has argued in its reply brief that, well, these are only procedures and what UIH is talking about is a substantive remedy. Well, the Supreme Court specifically rejected that argument in a case called *Mackey v. Linnear Collection Agency* which was decided in 1998. They commented in Footnote– or pardon me, not—I'm a year ahead of myself, Your Honor; 1988. They comment in the footnote that a garnishment and those type of post-judgment remedies are viewed as procedures within the meaning of Federal Rule 69(a). So, the bottom line is that we're entitled to whatever relief would otherwise be available to us under State law in order to enforce the judgment.

Now, Mr. Dodyk has made a big deal today about the *Aetna* case from the 1st Circuit, as well as the *Estate of Marcos* case form the 9th Circuit. Now, we've pointed out in our brief and I'll reiterate that in both cases the Court said, look, what we've got here is a judgment creditor who is coming in and doesn't have a right to do something under Sate law, but is asking us to fashion a remedy that the State law doesn't allow. In the *Aetna* case, you had this writ of ne exeat or whatever it is—and Your Honor has already commented I'm from Texas and I can't pronounce anything and I'll cop to that particularly as applies to this writ. The beginning point of the Court's

analysis in that case was that under Massachusetts' law, the relief they want is not available. Therefore, do we under Rule 69 have other power to grant that relief, and the Court concluded no. In the *Estate of Marcos* case, you had a similar situation, similar conclusion. There is no case in America, Your Honor, at least that we have been able to find, where a state has a turnover remedy such as Rule 69(g), that a Federal Court lacks the power to be able to utilize that remedy if the Court deems appropriate.

Now, the next question becomes—given that Rule 69(a) authorizes the Court to grant us relief under Rule 69(g), the question is, okay, is there any impediment for the Court to do so in this situation? Well, Wharf's first argument is this mandatory injunction which—I mean, I can't resist the temptation; I'm going to call if for what it is. It's nonsense. Rule 69(a) says that the Court applies State law "except that any statute of the United States governs to the extent that it is applicable." Now, nothing in Rule 69(g) requires us to show irreparable injury, no adequate remedy of law, or the standards for preliminary injunction. Under the *Hudson* case which is the Colorado Supreme Court case construing Rule 69(g), the issue was is the judgment creditor having trouble collecting? Your Honor, the record in this case establishes that. If the judgment debtors believe that we've got assets in the U.S. that we can go after or that they're not going to oppose in any way, shape, or form our attempts to enforce the judgment in Hong Kong, then its' a different story. But, they're not going to say that.

Now, Wharf argues in its reply brief that, well, you know, there's this 10th Circuit case that said the Federal rules have the force of statute, and therefore, you have to apply Rule 65 and Rule 52. Well, Rule 65 is the rule on preliminary injunctions and temporary restraining orders. We're not asking for preliminary injunction or temporary restraining orders. This is post-judgment. To the extent that Rule 52 applies and requires the Magistrate or the Court to make findings of fact, Magistrate Judge Pringle did that and the Court can adopt those

findings, affirm those findings, make additional findings, but it all should come out to the same way.

The other problem though is that this whole concept is a mandatory injunction, and therefore, you have to ingraft onto that the whole body of Federal injunction law. Now, there's no case that Wharf has cited and we have not been able to find any that would apply that logic in the context of post-judgment collection proceedings. The closest that either side, I think, has been able to come up with is this *Drexler* case which is a pre-judgment attachment case and the Court specifically says if the judgment is for the purpose of securing the judgment, then the state law applied as to the attachment.

Now, this isn't surprising, you know, given their argument. Exactly what would it mean in the context of being able to enforce a money judgment that you would have an irreparable injury which is by definition an injury that cannot be compensated through money damages. What exactly would that mean? What would it mean to have no adequate remedy at law when, by definition, you have a remedy at law; a money judgment. Your Honor, I think that—absurd of argument demonstrates that what we're dealing with here on this—as far as this mandatory injunction argument is about is just that, an absurdity.

Now, let me make one more point. If Wharf is arguing that we have to show difficulty in collection in order to be able to get relief under Rule 69(g), then again tell us what it is that we can execute on applying the laws of the United States or tell us basically we're home free when we go to Hong Kong. But, otherwise, what is it that we're supposed to do other than to seek relief under Rule 69(g)?

Now, I want to comment on Wharf's extraterritoriality argument. We've been through probably five briefs now. They still fail to cite a single case, *Law Review* article, treatise, or anything else that supports this argument. The presumption against the extraterritorial application of statutes arises in the

context of figuring out whether somebody has a cause of action for conduct that occurs overseas, on the high seas, something like that. So, for example, the question in the *EEOC v. Arabian-American Oil* case that they tend to cite a lot is do the Federal civil rights laws, Title 7, do those apply to conduct in Saudi Arabia? Okay? And, the answer is, no, you don't have a cause of action for Title 7 violations occurring in Saudi Arabia. Another case was—

THE COURT: The prospects of that are just prodigious.

MR. WILSON: Yeah. So, that's what all these cases have to do with. There are no case in America that would apply the presumption against extraterritoriality in the context of post-judgment collection efforts against an entity over whom this Court has personal jurisdiction. Now, I disagree with Mr. Dodyk and I disagree with him very strongly that this is not an issue of personal jurisdiction. It's precisely an issue of personal jurisdiction. Under *International Shoe* and its progeny, when a defendant is subject to personal jurisdiction, it is deemed jurisdictionally present in this state. That's the difference between *International Shoe* and the predecessor case, *Ponoyer v. Neff*, which said that you had to be physically present and that's the only thing in which personal jurisdiction could be based.

In this case, Wharf didn't even contest personal jurisdiction. As we get into the post-judgment discovery stuff, we start to understand why. They're a reporting entity with the Securities and Exchange Commission. They have bank accounts here. They have hotels here. They have other property here or at least through subsidiaries and all this type of this thing which would make a personal jurisdiction objection absolutely impossible.

So, the next question becomes, okay, if you have personal jurisdiction over a defendant, what does that mean exactly? What does it mean? Well, let's go back to Wharf's favorite case. In the *Drexler* case on which they rely—a big

case that they trumpet—the issue was could you order the defendant in that case to turn over as a matter of pre-judgment attachment, stock certificates that were held in other states and in other countries? The Court—the 2nd Circuit in rejecting the argument that Wharf is relying on now, said, look, this is a question of personal jurisdiction. If you're got jurisdiction, we can order them to turn over their property wherever it's located; whether it's in Singapore, Siam, or even Texas, I suppose. And so, we've cited a whole bunch of cases in our papers. Magistrate Judge Pringle picks up on these cases in his order and he says, look, this is an issue of personal jurisdiction.

Now, let me go further. If what Wharf is saying is correct, then this Court would be totally without power even to order—under Rul 37, Wharf to produce documents located in Hong Kong or other offshore locations. That issue—and, Your Honor, I submit by analogy the companion issue of the application of post-judgment remedies has already been litigated and the cases come down unequivocally on our side. In the *Insurance Company of Ireland* case—and then, there's this French name about aluminum in New Guinea which I never can pronounce, but Your Honor knows the case—the issue was whether this foreign defendant, this insurance company, could be ordered to produce documents in London. And, that case was litigated below and the insurance company said, look, you don't have any power over us. We're in Ireland. You can't make us turn over documents in London. The District Court said, look, you violate my order, you're subject to contempt. I find that you are automatically subject to personal jurisdiction. The case went up to the Supreme Court. The Supreme Court said, yep, you're absolutely right. The Court's personal jurisdiction means that the Court has the power to order somebody subject to its jurisdiction to do something even though it requires them to bring stuff into this country from a foreign country.

It gets even better. In an older case which is actually back in 1958, the (case spoken in French)—and I can't speak

French. I speak some Spanish, but that's—anyway, I'll call it the Rodgers case, the French name in Rodgers. The issue was whether a U.S. litigant could be ordered—or, pardon me, a foreign litigant could be ordered to produce documents located in Switzerland when the production of those documents would violate Swiss law. And, the Supreme Court had no trouble concluding that the answer is yes. We can require somebody to go to do an act in a foreign country even if it violates that country's law.

Now, like I say, it gets even better. The 10th Circuit in the context of the infamous *Uranium Anti-Trust Litigation* dealt with a similar issue and there was a District Court case from the Northern District of Illinois, a related case, called *In Re: Uranium Anti-Trust Litigation* which says, look, the bottom line is that the personal jurisdiction gives the Court power to order a litigant to perform acts outside of the jurisdiction or abroad. And, they cite Restatement Second of Conflicts 53 which says exactly that.

Now, the 10th Circuit dealt with this—what I'll call the Rodgers issue in a case called *Arthur Anderson* from 1976 and they said, look, *Anderson* says that it would violate international law for it to produce these documents located in Switzerland and all this stuff, and the Court said so what; get the documents, bring the documents over here. And then, *Anderson* closed. They said, well, if you don't like that argument, let me give you another one. I'll make this argument about international comity. They said, you know, the relations of nations, the United Nations, the United Federation of Planets, there has to be some—there has to be some issues that has to do with international comity. You've got a foreign citizen over here and shouldn't we basically let the litigant, Arthur Anderson, off the hook because these documents are broad to avoid offending Switzerland.

The 10th Circuit wrote as follows in response to that argument. "We are not impressed by *Anderson*'s contention

that international comity prevents a domestic Court from odering action which violates foreign law." If the problem involves a breach of friendly relations between two nations, *Anderson* should call the matters to the attention of those officers and agencies of the U.S. charged with the conduct of foreign affairs and they can make a representation to the Court as they deem suitable. *Anderson* has not taken this action; instead, it purports to represent the United States." And, the Court continued, "Foreign law cannot invalidate an order which local law authorizes."

In this case, we have no hint, suggestion, or even an implication that this Court ordering Wharf to pay UIH violates Hong Kong law or any other law in the world. And, if the 10th Circuit rules that in the case of a litigant who is ordered to produce documents that would be in violation of law and they said, look, we have the power to do that, then so much more in this case where—I mean, basically what you have—and, this is really, I think, where we have to come down to. You have a very rich company that's just trying to avoid paying. They don't want to pay us; hence, they're going to try every trick in the book to weasel out of having to pay us, and that's what we've got going on here.

Now, the other spin on Wharf's argument, Your Honor, is that Wharf is really trying to say that we're foreign; therefore, we get a break. We're entitled to special treatment, deference, or something else because not only are we a law breaker, we're a law breaker from Hong Kong. Well, it doesn't work that way either. The Supreme Court in another case which has a French name—and I won't even attempt to pronounce it, but I'll give you the English translation, the *National Industrial Society* case which was from 1987. That dealt with whether the procedures for—rather, the Hague Convention on the taking of evidence abroad applied to a foreign litigation in a U.S. Court. Okay? So, you've got, in other words, a Wharf that sued here, submits to personal jurisdiction here, and then says, well, you know, we don't want

to have to respond to discovery under the Federal rules. We want to have to be subjected to the—we want to be able to hide behind essentially the procedures under the Hague Convention for the taking of evidence abroad. The Supreme Court said, no, that's wrong. They're subject to personal jurisdiction here. They're subject to our discovery rules. The Supremem Court in a footnote also said that—basically rejected this "we're foreign and we're special" type of argument that Wharf is trying to take here. And, I'll quote again, Your Honor, because I think the quote is good. It says, "Since the District Court unquestionably had personal jurisdiction over petitioners, they are subject to the same legal constraints including the burdens associated with American judicial competitors as are their American competitors."

Well, that's exactly what we have here. You've got Wharf trying to say, "We're foreign, and we get a break," but what the Supreme Court has said is, look, you've got a level playing field. The scales of justice are—proverbial scales of justice are even. You don't get any breaks, but on the other hand, you don't get any downside because of the fact that you're foreign.

Now, I want to conclude by just commenting very briefly about Wharf's motion for stay without bond. Magistrate Judge Pringle in his order set out the grounds for such a stay and, you know, Wharf comes back by saying, well, we really are really rich. That's not the issue. The question is have they satisfied the other factors that would be required? Can they show that the collection process will not be complex? Can they show that they will be willing to pay UIH off in full without a global game of Catch Me If You Can after the 10th Circuit affirms this Court's judgment?

To grant a stay now, Your Honor, basically is only going to be a vehicle to allow Wharf to delay the ultimate for an indefinite period of time. To the extent that they have any assets here in the U.S. and, I think, Your Honor, they don't and

we've shown that. If they disagree, let them tell us. Let them tell us where they are and we'll go execute against them. But, to the extent that they have any operations which based on the collection strategy that we have instituted, so far, if they now are vulnerable to our attempts, you can bet that in the days after the stay, they certainly are going to try to do everything possible to restructure their operations, to restructure their business practices in order to try to make themselves even more judgment-proof.

There's no evidence and the defendants don't even argue this if they intend to pay the judgment. Indeed, everything that they said in the press, everything they've represented before this Court is they are going to fight until the ends of the earth to avoid having to pay this thing. They shouldn't be allowed to string us out, Your Honor. We're entitled to be paid. If I can close with this corny metaphor or, I guess, one that perhaps is apt is that the scales of justice have plunked down in UIH's favor. We're the good guys, they're the bad guys; those people in the box found it.

Now, we respectfully ask for this Court's help in enforcing our judgment and in denying their motion to stay such that we don't end up in a situation where we have been delayed in a way that only benefits them and deprives us of the money that we fought for so long.

Your Honor, I typed up just a listing of the additional cases that I cited to the Court today. If the Court please, I'd like to tender those to Mr. Gilmore and to the other side.

THE COURT: All right.

(Pause.)

THE COURT: Thank you.

MR. WILSON: Thank you, Your Honor.

THE COURT: Anything else, Mr. Dodyk?

MR. DODYK: Your Honor, I'll be brief.

I don't feel that the parties are coming to a consensus on the legal issues, Your Honor. So it doesn't look like we're going to have a stipulated order on this matter.

But, let me just say briefly because I have said this before, the question before Your Honor is whether or not you should issue an order which requires Wharf to bring properties from Hong Kong and pay them into the registry of the Court. That order, Your Honor, has been characterized by the Federal Courts. That type of order is a mandatory injunction.

The cases cited or, I should say, referred to by Mr. Wilson, not a one of those cases sanctions a Federal Court using its injunction powers to make such an order in circumstances of this kind. In fact, the most relevant cases which are *Markarian* and *Hilow* specifically state that the type of incidents which Mr. Wilson was discussing which have to do with a foreign location of assets and the alleged uncooperativeness of the defendant are not reasons which would allow a Federal Court to dispense with the normal reliance on self-executing measures for the enforcement of a money judgment. And, there is, Your Honor, no case cited to you to any contrary effect.

Similarly, with respect to the characterization of the order as a mandatory injunction, we have cited to Your Honor the *Teradyne* case and *Drexler* from the 1st and 2nd Circuits which plainly characterize the type of order here as an injunctive order. And, again, there has been no contrary citation by the plaintiffs of any authority. Their only statement is, well, those were pre-judgment orders. But, plainly, the nature of an order determines whether or not it is an injunctive order, not the point in the proceeding in which it is rendered. And, Your Honor, whether you're talking about Colorado law or Federal law makes no difference. If the order is an injunctive order, the same standards are applicable under Federal and State law.

Now, I think, Your Honor, that the fundamental flaw in the approach made here to the availability of injunctive relief to a money judgment creditor in this situation is that there is no law which justifies the resort to injunction remedy merely because the plaintiff in this case would prefer not to use direct methods of execution whether they be in New York or California or Hong Kong. Hong Kong, contrary to some of the suggestions which were made, is a civilized sovereignty which follows laws of the United Kingdom. They follow the laws of the United Kingdom with respect to the enforcement of judgments. While there may be some questions as to certain aspects of that enforceability, there is certainly no reason to believe that the core judgment in this case would not be enforceable in Hong Kong, as it is in other jurisdictions in the United States.

So, it is not a question of Wharf seeking some special dispensation because it is foreign. It is a request by Wharf to be treated as any other money judgment debtor which means that the money judgment creditor is under Federal law which I say to your Honor is applicable whether you're proceeding under the first sentence of Rule 69(a) or some State procedure referred to by the second sentence of 69(a) that the money judgment creditor is remitted to self-executing remedies because imprisonment for debt and the use of equitable powers to collect money judgments is something that went out of American jurisprudence about 200 years ago. And, there is no different situation presented here by Wharf.

UIH is in exactly the same position as any judgment creditor except that, here, it claims some right to be able to collect its money in Denver. Your Honor, I don't think that's the law. I think Wharf has to enforce that remedy through execution wherever those assets are found. I suggest to Your Honor, that the authorities would not support the issuance of an injunction under the present circumstances.

Thank you for your time.

THE COURT: Thank you.

I suppose Mr. Bauer failed to ask. Do they still have debtor prisons in the United Kingdom?

MR. BAUER: I can ask Mr. Blackmon the next time I talk to him, Your Honor. I don't know the answer to that.

THE COURT: Okay.

MR. BAUER: That might be an interesting supplementary procedure.

THE COURT: That's right.

Well, I suppose I need to explain myself in that I granted the stay and oral argument because, as these things sometimes happen, the issue that it raised with considerable importance to the Court—not just me; to our Court here—was the question of referrals to the Magistrate and what sort of authority the Magistrate had. And, I thought that this was a case in which those issues would suggest a written memorandum opinion.

But, having reviewed Magistrate Judge Pringle's order, I find that it really is entirely academic because it doesn't matter whether I accept his order as a reocmmendation or whether I use a clearly erroneous or abusive discretion standard in a review I agree with him entirely. I don't think that there is any injunction involved in this. The cases that were cited with particular reference to that, *Hilow v. State of Marcos* and *Aetna Casualty & Surety Company v. Markarian* are cases where the Federal Trial Courts were considering post-judgment remedies in addition to those provided under State law and not cases such as the one which is presented here with a direct application of State law. And, it is not a matter with which I disagree with Magistrate Judge Pringle who, I might point out, is the author of perhaps the best treatise on Colorado law existing, and clearly an authority on this particular subject.

And, I don't think that Rule 69(g) does sound like, walk like, or talk like an injunction.

Now, that being the case, it seems to me that Wharf can avoid all of this difficulty by posting a supersedeas bond and that is—I think, the only people who don't have to do that are those that work for the United States Government and I'm only honoring that because I took an oath to uphold the law. But, the warranted wealth of Wharf as being sufficient surety is in my view a telling remark that the supersedeas bond does not work a hardship on it to avoid execution.

So, I am reiterating the orders of Magistrate Judge Pringle. I don't think I need to rule, since I already have said that I agree with him no matter what standard of review is used, but I'll make that my order, and we'll wait for another time to decide the issue of whether the order of the United States Magistrate Judge here can be done in post-judgment proceedings and he has that jurisdiction.

MR. WILSON: I'm sorry, Your Honor, as I understand Your Honor's ruling, the stay of Magistrate Judge Pringle's order is vacated.

THE COURT: They stay is lifted. There is no stay.

MR. WILSON: Very good.

THE COURT: All Right. Thank you, gentlemen.

MR. DODYK: Your Honor?

THE COURT: Mr. Dodyk?

MR. DODYK: May I make a request, Your Honor?

THE COURT: Yes.

MR. DODYK: My request would be simply that Your Honor grant defendants a stay of the implementation of that order, first, to permit counsel to consult with defendants in

Hong Kong; and, secondly, pending the appeal of that order to the 10th Circuit.

THE COURT: Well, I will not grant it for the stay pending appeal. That's something you take up with the Court of Appeals if you wish. But, I'll grant a 10 day stay so you can consult with Hong Kong with your clients and counsel there.

MR. WILSON: Your Honor, in light of that ruling, we also ask for an additional order of the Court that they not move their assets around in order to try to evade—

THE COURT: Yes. Yes, they may not move assets during that 10 day stay or dispose of them.

MR. BAUER: With respoect to the assets that are the subject of Judge Pringle's order.

THE COURT: That's correct. Okay. Thank you all.

(Whereupon at 11:43 a.m., the hearing was concluded.)

I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

October 23, 1997

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APPENDIX D

ORDER OF U.S. MAGISTRATE JUDGE BRUCE D. PRINGLE GRANTING PLAINTIFFS-APPELLEES' MOTION FOR ASSISTANCE IN CONNECTION WITH A WRIT OF EXECUTION, FILED SEPTEMBER 25, 1997 (UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO)

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

SEP 25 1997

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 94-K-2560

UNITED INTERNATIONAL HOLDINGS, INC., et al.,

Plaintiff(s),

v.

THE WHARF (HOLDINGS) LIMITED, et al.,

Defendant(s).

ORDER OF UNITED STATES MAGISTRATE

JUDGE BRUCE D. PRINGLE

This matter comes before the Court on Plaintiffs' Motion for Assistance in Connection with a Writ of Execution, filed July 23, 1997 (the Motion for Assistance). On July 24, 1997, an Order of Reference was entered referring all proceedings supplementary to and in aid of a judgment pursuant to Fed. R. Civ. P. 69(a) to a magistrate judge for resolution. The Motion for Assistance has been fully briefed, and oral argument would not materially assist the Court in its analysis of the issues presented. For the reasons discussed below, it is ordered that the Motion for Assistance be granted.

On May 22, 1997, and pursuant to jury verdicts returned in the above case, the Court entered judgment in favor of the plaintiffs and against the defendants in the following amounts: (a) Wharf (Holdings) Limited—$125,000,000; (b) Wharf Communications Investment, Ltd.— $67,000,000; and (c) Stephen Ng—$67,000,000. The judgment also awarded prejudgment interest. Subsequently, certain costs were taxed against the defendants. No supersedeas bond has been posted, and plaintiffs have commenced efforts to collect the judgment. The instant Motion for Assistance concerns these collection efforts.

The Motion for Assistance relates only to the judgement against Wharf (Holdings) Limited (hereinafter "the Wharf"). It seeks a turnover order commanding the Wharf to deliver certain personal property consisting of currency in various foreign bank accounts and stock certificates to the United States Marshal for the District of Colorado. The Wharf objects to such an order on a variety of grounds, each of which will be considered below.

Initially, the Wharf asserts that the Court has no power to issue a turnover order relating to assets outside the state of Colorado, or, alternatively, that the geographic reach of the Court's power is so uncertain that the issue should be certified to the Colorado Supreme Court for clarification. The Court rejects the Wharf's contentions.

Fed. R. Civ. P. 69(a) provides that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution, unless the court directs otherwise." The Rule goes on to state that "[t]he procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . . ." Initially, the Court notes that although a writ of execution is the normal process for enforcing a judgment, the "unless" clause in Rule 69(a) clearly authorizes the court to

utilize other means of enforcement. *Clark v. Wilbur*, 913 F. Supp. 463, 465-66 & n. 4 (S.D.W.Va. 1996). There may be limitations on the use of means other than execution. (*See* James W. Moore, 13 Moore's Federal Practice §69.02, at 69-6 (3d Ed. 1997)), but both the courts and commentators have recognized the propriety of employing the "unless" clause where execution would be an inadequate remedy. *Id. See also Robbins v. Labar Transp. Corp.* 599 F. Supp. 705, 707 (N.D. Ill. 1984). Such a situation pertains here, since, absent statutory authority to the contrary, the United States Marshal for the District of Colorado cannot execute on property located outside the state.

Having determined that Fed. R. Civ. P. 69(a) imposes no restriction on the Court's power to issue the type of order requested by plaintiffs, we now turn to whether such an order is authorized by state law. The salient provision is Colo. R. Civ. P. 69(g), which states: "The court . . . may order any party or other person over whom the court has jurisdiction, to apply any property other than real property, not exempt from execution, whether in the possession of such party or other person or owed the judgement debtor, towards satisfaction of the judgement."

The Wharf contends that Colo. R. Civ. P. 69(g) does not apply extraterritorially, or that at least the issue of extraterritorial application is sufficiently unclear to warrant certification of the question to the Colorado Supreme Court. First, the Court notes that the Wharf's reference to "extraterritorial application" is somewhat of a misnomer. While the order requested would be directed to a foreign corporation, it is quite obviously a corporation over which this Court has obtained *in personam* jurisdiction. The Court's jurisdiction over the Wharf continues until the judgment is satisfied. *Riggs v. Johnson County*, 73 U.S. 166, 187 (1867). There is nothing in Rule 69(g) remotely suggesting that its scope is limited to judgment debtors who are domiciliaries of Colorado. Indeed, there is nothing in the entire collection

scheme embodied in Rule 69 intimating that only domestic judgment debtors can be reached.

The Wharf's position seems to be premised not on the fact that it is a foreign judgment debtor, but rather on the fact that the property in question is located outside the state of Colorado. Again, there is nothing in the language of Rule 69(g) suggesting an intent to eliminate personal property outside the state from its ambit. On the contrary, the Rule simply refers to "any property other than real property . . . ." Thus, the Rule itself imposes no express geographic constraints. Additionally, the few courts which have considered a similar issue in conjunction with provisions such as Colo. R. Civ. P. 69(g) have had no difficulty concluding that they may be employed to reach property of the judgment debtor located outside the state wherein the judgment was rendered. *E.g., Aetna Casualty & Surety Co. v. Rodco Autobody*, 965 F. Supp. 104, 110-11 (D. Mass 1996); *Clark v. Wilbur,* 913 F. Supp. 463 (S.D.W.Va. 1996). Accordingly, the Court finds and concludes that Colo. R. Civ. P. 69(g) provides ample authority for issuing the requested turnover order, and that certification of the matter to the Colorado Supreme Court is not warranted.

Next, the Wharf contends that an order such as the one requested by the plaintiffs would be violative of international law. The Wharf cites no authority for such a proposition, and the Court has found none. To the contrary, numerous cases have approved orders requiring judgment debtors to turn over assets located in other countries. *E.g. United States v. First Nat'l City Bank*, 379 U.S. 378, 383-84 (1965); *Republic of the Philippines v. Marcos*, 862 F.2d 1355, 1364 (9th Cir. 1988); *United States v. Ross*, 302 F.2d 831, 834 (2d Cir. 1962); *United States v. McNulty*, 446 F. Supp. 90, 91 (N.D. Cal. 1978). Such an order does not per se involve any invasion of the sovereignty of another county, *Ross*, 302 F.2d at 834, and no foreign law is cited by the Wharf which would indicate that the situation is otherwise here.

The Wharf further contends that issuance of the requested order would deprive it of the opportunity to argue that the property is not subject to execution under Hong Kong Law. This position is flawed by a two-fold error. First, it is the law of the rendering jurisdiction (i.e., Colorado) that determines whether property is exempt from execution. *Chicago, Rock Island & Pac. Ry. Co. v. Sturm,* 174 U.S. 710, 717 (1899); *Clark v. Wilbur,* 913 F. Supp. at 467; *Johns v. Rozet,* 826 F. Supp. 565, 567 (D.D.C. 1993); *Marine Midland Bank v. Surfbelt, Inc.,* 532 F. Supp. 728, 729 (W.D. Pa. 1982). Second, the Court can frame a turnover order which preserves the Wharf's right to assert any applicable exemptions before the property in question is delivered to the plaintiffs or sold.

Finally, the Wharf argues that the Court should stay any supplementary proceedings pending appeal. Generally, a supersedeas bond is required as a condition for a stay of execution, *Miami Int'l Realty Co. v. Paynter*, 807 F.2d 871, 873 (10th Cir. 1986), and, of course, the Wharf would be automatically entitled to a stay of execution pending appeal if it posts an appropriate supersedeas bond. *Fed. R. Civ. P. 62(d).* In exceptional circumstances, the Court has discretion to stay execution in absence of a supersedeas bond. *Olympia Equip. Leasing Co v. Western Union Tel. Co.,* 786 F.2d 794, 796 (7th Cir. 1986). The factors to be considered in deciding whether to waive a supersedeas bond are (a) the complexity of the collection process; (b) the amount of time required to obtain a judgment; (c) the degree of confidence that the court has in the availability of funds to pay the judgment; (d) whether the defendant's ability to pay the judgment is so plain that the cost of a bond would be a waste of money; and (e) whether the defendant is in such a precarious financial situation that the requirement to post a bond would place other creditors of the defendant in an insecure position. *Wilmer v. Board of County Commissioners of Leavenworth County, Kansas,* 844 F. Supp. 1414, 1419 (D. Kan. 1993).

All of these factors militate heavily in favor of conditioning a stay in this case on the posting of a supersedeas bond. The collection process will undoubtedly be complex, in that all, or at least a substantial portion of the Wharf's assets appear to be outside of the United States. The appeal process is likely to be protracted. The Court has no basis for concluding that the Wharf will voluntarily pay the judgment, or indeed if the Wharf even has the ability to pay, if the case is affirmed on appeal. The Court has no information regarding the financial condition of the Wharf. Accordingly, the Court rejects the Wharf's request that supplementary proceedings be stayed until the appeal is concluded.

Based on the foregoing, the Court hereby ORDERS that the Motion for Assistance in connection with a Writ of Execution be GRANTED as follows:

1. On or before October 15, 1997, the Wharf shall turn over to the Clerk of the Court the following assets:

a) All funds on deposit in any Wharf bank account and/or time deposit account in Hong Kong or Singapore up to the amount of the judgment plus pre-judgment interest, post-judgment interest and costs;

b) All original stock or share certificates representing the Wharf's ownership interest in Wharf Hong Kong Limited.

On or before October 15, 1997, the Wharf may file a claim of exemption asserting that all or any portion of the assets turned over pursuant to this Order are exempt from execution.

All assets turned over pursuant to this Order shall be held by the Clerk of the Court until further order of the Court.

DATED THIS [25th] DAY OF SEPTEMBER, 1997;

BY THE COURT:

/s/ Bruce Pringle
United States Magistrate Judge

APPENDIX E

JUDGMENT ON JURY VERDICTS, FILED MAY 22, 1997 (UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLORADO)

FILED
UNITED STATES DISTRICT COURT
DENVER, COLORADO

MAY 22, 1997

JAMES R. MANSPEAKER
CLERK

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge John L. Kane, Jr.

Civil Action No. 94-K-2560

UNITED INTERNATIONAL HOLDINGS, INC., et al.,

Plaintiffs,

v.

THE WHARF (HOLDINGS) LIMITED, et al.,

Defendants.

JUDGMENT ON JURY VERDICTS

Kane, J.

This matter comes before the Court for entry of judgment following a trial and the return by the jury of special verdicts. The trial commenced on February 18, 1997 and concluded on April 29, 1997 when the jury returned its verdicts.

The parties have stipulated that the Plaintiffs United International Holdings, Inc. and United International Holdings, Inc. and United International Holdings Asia are collectively referred to as "UIH" and shall be referred to as UIH herein.

On April 29, 1997 the jury returned verdicts in favor of UIH and against the Defendants as follows:

A. Against the Wharf (Holdings) Limited:

(i) **Deceit Based on Fraud:**

Compensatory Damages: $67.0 million

Exemplary Damages: $58.5 million

(ii) **Negligent Misrepresentation:**

Compensatory Damages: $8.1 million

(iii) **Breach of Contract:**

Compensatory Damages: $67.0 million

(iv) **Breach of Fiduciary Duty:**

Compensatory Damages: $67.0 million

Exemplary Damages: $58.5 million

(v) **Violation of Rule 10b-5 of the Securities Exchange Act of 1934 and C.R.S. 11-51-604(3).**

Compensatory Damages: $67.0 million

B. Against Wharf Communications Investment, Ltd. ("WCIL"):

(i) **Deceit Based on Fraud:**

Compensatory Damages: $67.0 million

(ii) **Negligent Misrepresentation:**

Compensatory Damages: $8.1 million

(iii) **Breach of Contract:**

Compensatory Damages: $67.0 million

(iv) **Violation of Rule 10b-5 of the Securities Exchange Act of 1934 and C.R.S. 11-51-605(3).**

Compensatory Damages: $67.0 million

C. Against Stephen Ng:

(i) **Deceit Based on Fraud:**

Compensatory Damages: $67.0 million

(ii) **Negligent Misrepresentation:**

Compensatory Damages: $8.1 million

(iii) **Violation of Rule 10b-5 of the Securities Exchange Act of 1934 and C.R.S. 11-51-604(3).**

Compensatory Damages: $67.0 million

The jury also found The Wharf (Holdings) Limited to be a "controlling person" of WCIL and Stephen Ng, and WCIL to be a controlling person of Stephen Ng under Section 20(a) of the Securities Exchange Act of 1934 and C.R.S. 11-51-604(5).

Accordingly, judgment is hereby entered for UIH as follows:

(i) Against The Wharf (Holdings) Limited—$125.5 million

(ii) Against WCIL—$67.0 million

(iii) Against Stephen Ng—$67.0 million

In addition, pursuant to § 5-12-102, C.R.S. 1973, UIH is entitled to an award of prejudgment interest at 8% per annum compounded annually from October 31, 1992 on the $67.0 million compensatory damages. As of April 30, 1997, prejudgment interest had accrued in the amount of $27,788,881. To this should be added $419,559, which is $19,979 per day for the 21 days beginning May 1, 1997 to the

date of this judgment. Postjudgment interest shall accrue on the total amount at 6.06% from the date of this judgment until satisfied.

In addition, pursuant to the Colorado Securities Act, Section 11-51-605(3), UIH is entitled to its costs and attorneys' fees incurred in prosecution of this action. The costs will be considered separately pursuant to a Bill of Costs to be submitted by UIH. The attorneys' fees to which UIH is entitled shall be determined in accordance with the procedure set forth in the Court's Order of May 15, 1997.

Finally, and pursuant to D.C.COLO.LR 54.1, it is specifically stated that UIH is entitled to its costs in this matter. A bill of costs must be filed on the form provided by the court within ten days after entry of this Judgment.

This Judgment is entered this 21 day of May, 1997.

BY THE COURT:

/s/ John L. Kane, Jr.
JOHN L. KANE, JR.
Senior United States District Judge

APPENDIX F

ORDER DENYING PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC, FILED JUNE 8, 2000

UNITED STATES COURT OF APPEALS

FOR THE TENTH CIRCUIT

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; UIH ASIA INVESTMENT COMPANY, a Colorado general partnership, Plaintiffs - Appellees, v. THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; WHARF CABLE LIMITED, a Hong Kong company; STEPHEN NG, a Hong Kong citizen, Defendants - Appellants.	Nos. 97-1421 98-1002

ORDER

Filed June 8, 2000

Before **BRORBY, HOLLOWAY** and **BRISCOE**, Circuit Judges.

Due to clerical error in the order entered June 6, 2000, said order is reissued nunc pro tunc, in order to reflect the correct spelling of Judge Brorby's name.

Appellants' petition for rehearing is denied.

The petition for rehearing en banc was transmitted to all of the judges of the court who are in regular active service as required by Fed. R. App. P. 35. As no member of the panel and

no judge in regular active service on the court requested that the court be polled, that petition is also denied.

Entered for the Court
PATRICK FISHER, Clerk of Court

by: /s/ Audrey F. Weigel
Deputy Clerk

APPENDIX G

SECTION 10(b) OF THE SECURITIES AND EXCHANGE ACT OF 1934, 15 U.S.C. § 78J(b)

UNITED STATES CODE ANNOTATED
TITLE 15. COMMERCE AND TRADE
CHAPTER 2B—SECURITIES EXCHANGES

Current through P.L. 106-213, approved 5-26-2000

§ 78j. Manipulative and deceptive devices

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange-

(a) To effect a short sale, or to use or employ any stop-loss order in connection with the purchase or sale, of any security registered on a national securities exchange, in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

(b) To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

APPENDIX H

S.E.C. RULE 10b-5, 17 C.F.R. § 240.10b-5

CODE OF FEDERAL REGULATIONS

TITLE 17—COMMODITY AND SECURITIES EXCHANGES

CHAPTER II—SECURITIES AND EXCHANGE COMMISSION

PART 240—GENERAL RULES AND REGULATIONS, SECURITIES EXCHANGE ACT OF 1934

SUBPART A—RULES AND REGULATIONS UNDER THE SECURITIES EXCHANGE ACT OF 1934

MANIPULATIVE AND DECEPTIVE DEVICES AND CONTRIVANCES

Current through June 20, 2000; 65 FR 38332

§ 240.10b-5 Employment of manipulative and deceptive devices.

It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce, or of the mails or of any facility of any national securities exchange,

(a) To employ any device, scheme, or artifice to defraud,

(b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading, or

(c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

(Authority: Sec. 10; 48 Stat. 891; 15 U.S.C. 78j)

APPENDIX I

COLO. REV. STAT. § 4-8-319,
REPEALED BY LAWS 1996,
S.B. 96-132 § 2, JULY 1, 1996

Colorado
Revised Statutes

VOLUME 2

1992 REPLACEMENT VOLUME

COMMERCE I

Edited, Collated, Revised,

Annotated, and Indexed

Under the Supervision and Direction of the

COMMITTEE ON LEGAL SERVICES

by

CHARLES W. PIKE OF THE COLORADO BAR,

REVISOR OF STATUTES,

AND THE

OFFICE OF LEGISLATIVE LEGAL SERVICES

Published with Annotations through 820 P.2d 1205, 776 F. Supp. 1583, 942 F.2d 1584, 112 S. Ct. 1519, 133 Bankr. 1023, 63 U. Colo. L. Rev. 290, and 69 Den. U. L. Rev. 56 and from 11 Colo. Law. 1 through 21 Colo. Law. 487.

Reenacted by the General Assembly of the State of Colorado as the Statutory Law of Colorado of a General and Permanent Nature

Bradford Publishing Co.Denver, Colo.

Printers and Distributors

4-8-319. Statute of frauds. A contract for the sale of securities is not enforceable by way of action or defense unless:

(a) There is some writing signed by the party against whom enforcement is sought or by his authorized agent or broker sufficient to indicate that a contract has been made for sale of a stated quantity of described securities at a defined or stated price; or

(b) Delivery of a certificated security or transfer instruction has been accepted, or transfer of an uncertificated security has been registered and the transferee has failed to send written objection to the issuer within ten days after receipt of the initial transaction statement confirming the registration, or payment has been made, but the contract is enforceable under this provision only to the extent of the delivery, registration, or payment; or,

(c) Within a reasonable time a writing in confirmation of the sale or purchase and sufficient against the sender under subsection (a) of this section has been received by the party against whom enforcement is sought and he has failed to send written objection to its contents within ten days after its receipt; or

(d) The party against whom enforcement is sought admits in his pleading, testimony, or otherwise in court that a contract was made for sale of a stated quantity of described securities at a defined or stated price.

Source: L. 65. p. 1438. § 1: C.R.S. 1963. § 155-8-319; (b) R & RE. L. 81, p. 372, § 33, effective July 1.

APPENDIX J

DEFENDANTS' POST-TRIAL MOTION PURSUANT TO FED. R. CIV. P. 50 AND 59, FOR JUDGMENT AS A MATTER OF LAW, FOR A NEW TRIAL AND FOR OTHER RELIEF, FILED JUNE 5, 1997

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO
'97 Jun -5

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 94-K-2560

UNITED INTERNATIONAL HOLDINGS, INC., et al.,

Plaintiffs,

v.

THE WHARF (HOLDINGS) LIMITED, et al.,

Defendants.

DEFENDANTS' POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR A NEW TRIAL, AND FOR OTHER RELIEF

Pursuant to Federal Rules of Civil Procedure 50 and 59 and Colorado Revised Statute § 13-21-102, defendants The Wharf (Holdings) Limited ("Wharf Holdings)," Wharf Communications Investments Limited ("WCIL") and Stephen Ng collectively, ("defendants") respectively (i) renew their motion for entry of judgment as a matter of law in their favor on each of plaintiffs' claims against them; (ii) in the alternative, move for a new trial of those claims; and (iii) in the event the Court does not grant either of the foregoing relief, move the Court to disallow or reduce the jury's awards of exemplary and compensatory damages and to amend the May 21, 1997 Judgment on Jury Verdicts to exclude the award of prejudgment interest and attorneys' fees. In support of their motion, defendants state as follows:

1. This Court Should Disallow or Reduce the Jury's Award of $58.5 Million in Exemplary Damages Against Wharf Holdings.

(a) C.R.S. § 13-21-102(2) provides in pertinent part that, notwithstanding a jury award of exemplary damages:

> (T)he court may reduce or disallow the award of exemplary damages to the extent that:
>
> a. The deterrent effect of the damages has been accomplished; or
>
> b. The conduct which resulted in the award has ceased; or
>
> c. The purpose of such damages has otherwise been served.

(b) This Court should exercise its discretion to disallow or substantially reduce the exemplary award under C.R.S. § 13-21-102(2) for the reasons, among others, that: (i) the deterrent effect of such damages has been accomplished by the staggering award of compensatory damages, plus prejudgment interest and attorneys' fees and costs; (ii) the conduct which resulted in the award has ceased, and there is no risk of continued or repetitious conduct; and (iii) the purpose of such damages has otherwise been served because there is no threat to public safety or health, only an isolated economic injury, and there is no evidence that exemplary damages are needed to deter Wharf Holdings or others from acting similarly in the future, either in Colorado or elsewhere.

(c) This Court should enter judgment for Wharf Holdings or, at a minimum, order a new trial because the evidence at trial was legally insufficient to meet the standard of proof required by C.R.S. § 13-05-127 which provides in pertinent part: "Exemplary damages . . . shall only be awarded in a civil action when the party asserting the claim proves [entitlement] beyond a reasonable doubt." The evidence was legally insufficient,

among other things, to prove beyond a reasonable doubt that the conduct of Wharf Holdings showed malice or willful and wanton conduct as defined in C.R.S. § 13-21-102(1)(a) which provides in pertinent part that:

> "wanton or willful" conduct means "conduct purposefully committed which the actor must have realized as dangerous, done heedlessly and recklessly, without regard to consequences, or of the rights . . . of others, particularly the plaintiff."

C.R.S. § 13-21-102(1)(b).

(d) The Court should enter judgment for Wharf Holdings or order a new trial because Instruction No. 12 regarding exemplary damages violates the Due Process Clause. By instructing the jury in a fraud case that it could award exemplary damages if defendants' conduct "was attended by circumstances of fraud," the instruction failed to provide a sufficient guidance to the jury or notice to defendants of the type of conduct that is required to award exemplary damages beyond the conduct that can support an award of compensatory damages.

(e) The Court should enter judgment for Wharf Holdings or order a new trial because the magnitude of the award, particularly in light of plaintiffs' reliance on actions and individuals outside Colorado, violates the Due Process Clause. The magnitude of the award which UIH has asserted is the largest amount ever awarded by a jury in Colorado also violates C.R.S. § 13-21-102(1)(a) which only allows an award of "reasonable exemplary damages."

(f) The Court should order a new trial because there are fundamental inconsistencies in the jury's verdicts. On the one hand, the jury found that the conduct of Wharf Holdings "was attended by circumstances of fraud, malice or willful and wanton conduct," while finding on the other hand that the conduct of WCIL and Stephen Ng, the principal actors with the

only meaningful contact with UIH, was not. These and other internal inconsistencies are impossible to reconcile, especially considering that the requisite circumstances of fraud, malice or willful and wanton conduct as to Wharf *Holdings* had to be proved beyond a reasonable doubt.

(g) This Court should also order a new trial based on the inconsistency arising from the jury's verdicts on plaintiffs' alternative and incompatible theories of relief. For example:

> (i) The jury could not consistently find deceit based on defendants promising to give UIH 10% of the company with no real intention of doing so, and at the same time find that defendants had in fact contracted to give UIH that same 11% share of the company.
>
> (ii) The jury was also inconsistent in its findings that the same misrepresentations or nondisclosures were "intentional" for plaintiffs' deceit based on fraud and securities claims, but "negligent" for plaintiffs' negligent misrepresentation claim. It is impossible for a person to be guilty of deceit based on fraud based on a negligent misstatement.
>
> (iii) The jury could not consistently find one contract under plaintiffs' breach of contract claim and another for a joint venture under plaintiffs breach of fiduciary duty claim, where there was only a single injury.

(h) The Court should order a new trial because the award of exemplary damages exceeds the amount of plaintiffs' alleged actual damages attributable to its claims of fraud based on deceit and breach of fiduciary duty, contrary to C.R.S. § 13-21-102(1)(a), which provides:

> The amount of such reasonable exemplary damages shall not exceed an amount which is equal to the amount of the actual damages awarded to the injured party.

Plaintiffs' own expert testified at trial that the amount of actual damages attributable to these two claims was $50 million, whereas the jury awarded $59.5 million in exemplary damages.

(i) The Court should enter judgment for Wharf Holdings or order a new trial because the jury was allowed at the urging of plaintiffs' counsel to consider the wealth of the defendants and those who control them. C.R.S. § 13-21-102(6) provides that such considerations are impermissible:

> In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be considered in determining the appropriateness or amount of such damages.

2. This Court should Disallow or Reduce the Jury's Award of $67 Million in Compensatory Damages Against Each Defendant on UIH's Claims for Deceit Based on Fraud, for Breach of Contract and Fiduciary Duty, and for Fraud under the Federal and Colorado Securities Laws.

(a) The Court should enter judgment for defendants or order a new trial because the jury's award of damages to compensate plaintiffs for the loss of their alleged "option" to invest in the Wharf cable project are grossly excessive. Among other things, plaintiffs have been awarded $67 million as compensation for the loss of an investment that UIH's board of directors never committed to fund. Plaintiffs assumed no downside risks of any kind because they asserted that defendants agreed to reimburse them for their time and expenses in the event UIH did not invest in the project.

(b) The Court should enter judgment for defendants or order a new trial because the jury's award is not supported by legally sufficient evidence. It is based on the asserted value of a 10% interest in the Wharf cable project, rather than the value of plaintiffs' alleged "option" to obtain such an interest, which is legally, economically and factually different. UIH's own

investment bankers and principal shareholder assigned no value to the "option."

(c) The Court should enter judgment for defendants or order a new trial because the jury's award on the deceit based on fraud and securities claims is not supported by legally sufficient evidence. Plaintiffs' own expert testified at trial that the amount of actual damages attributable to these claims was $50 million, whereas the jury awarded $67 million in compensatory damages on these claims.

(d) The Court should order a new trial because of errors in the instructions and evidentiary rulings relating to the compensatory award. Among other things:

(i) The Court erroneously refused to admit defendants evidence regarding mitigation of damages, rejected Defendants Proposed Instruction No. 62A Mitigation of Damages and failed to otherwise instruct the jury on mitigation of damages.

(ii) The Court erroneously refused to admit defendants evidence regarding the actual performance of the Wharf cable project after the alleged breach of contract, including both past and projected losses. This allowed plaintiffs and their expert to make inaccurate and misleading damage projections and resulted in an award that put plaintiffs in a better position than they would have been in had the defendants' asserted wrongs never occurred.

(iii) In contrast to the exclusion of defendants' evidence relating to the project's actual performance, the Court erroneously allowed plaintiffs to introduce and make misleading arguments from recent data regarding the alleged value of the Wharf cable project.

3. <u>This Court Should Amend Its Judgment to Exclude the Award of Prejudgment Interest and Attorneys' Fees to Plaintiffs and to Dismiss All Claims of Either UIH or UIH Asia</u>.

(a) The Court should reconsider and reverse its award of prejudgment interest to plaintiffs under C.R.S. § 5-12-102, which provides in pertinent part:

> When money or property has been wrongfully withheld, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property . . . C.R.S. § 5-12-102(1)(a).

The undisputed evidence established that an award of prejudgment interest here is impermissibly based on future damages. Even under plaintiffs' theory of the case, they would not have been entitled to liquidate any ownership interest in the Wharf cable project until after 1997, when judgment was entered. Because plaintiffs lacked a present right to $67 million, that amount was not "wrongfully withheld" within C.R.S. § 5-12-102(1)(a).

(b) The Court should reconsider and reverse its award of attorneys' fees to UIH because it erroneously allows plaintiffs to cumulate damages under different claims for a single injury. Plaintiffs should not be permitted to recover exemplary damages under their claims for deceit based on fraud and breath of fiduciary duty, which do not allow recovery of attorneys' fees, and then recover attorney's fees under the Colorado securities law, which do not permit exemplary damages. For the reasons stated in Paragraph 1(g) of this Motion, this Court should also reconsider and reverse the award of both attorneys' fees and exemplary damages because plaintiffs' underlying claims were alternative and inconsistent theories of recovery for the same injury.

(c) The Court should reconsider its award of attorneys' fees under C.R.S. § 11-51-604(3), and exercise its discretion under that statute not to allow such fees on the ground they unreasonably add to the already excessive damages awarded by the jury.

(d) The Court should reconsider and reverse its entry of judgment in favor of both UIH and UIH Asia. Each plaintiff had its own burden of proof on each claim against each defendant. At trial, however, plaintiffs did not distinguish between their respective proofs. Accordingly, judgment on the jury's verdicts should have been entered for UIH or UIH Asia, but not both.

4. This Court Should Dismiss the Case for Lack of Subject Matter Jurisdiction Because There Was No Legal or Sufficient Evidentiary Basis for Plaintiffs' Only Federal Question Claims Under the Securities and Exchange Act of 1934.

(a) Rule 12(h)(3) Fed. R. Civ. P., mandates that, "Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action. It is undisputed that the only basis for federal subject matter jurisdiction was plaintiffs' claims under §§ 10(b) and 20 of the Securities Exchange Act of 1934. However, the evidence established conclusively that the parties intended that Hong Kong law, not U.S. law, should govern their relationship, and the parties' choice of law was confirmed by well-settled conflicts of law principles. Because Hong Kong law governed, there was no legal basis for plaintiffs' claims under the federal securities laws and those claims should have been dismissed.

(b) The record also failed to support federal jurisdiction because there was no legally sufficient evidentiary basis for a finding of fraud in connection with an enforceable contract for the purchase of a security, which is required for a violation of § 10(b) of the Exchange Act.

(i) As a matter of law, there can be no contract where the parties' intent is not to be bound until a formal written agreement is finalized, approved and signed. The Court should enter judgment that there was no enforceable contract or order a new trial, because no reasonable jury could have rejected the substantial objective evidence that both parties -- or at least Wharf -- did not intend to be bound until a formal written document was finalized, approved by the parties, boards of directors, and signed, none of which ever happened.

(ii) Likewise, no reasonable jury could have found that there was a meeting of the minds and certainty on all essential terms of the alleged contract, or that all conditions precedent to its formation and performance were met.

(c) The Court should also enter judgment that there was no violation of § 10(b) of the Exchange Act, or order a new trial, because there was no legally sufficient evidentiary basis for the jury to find that the asserted fraud related to the nature, characteristics or value of UIH's alleged oral option, which is required for a § 10(b) claim.

(d) Absent a primary violation of § 10(b) of the Exchange Act, there was also no legal basis for "control person" liability under § 20 of the Act.

(e) For the reasons stated in Paragraph 1(g) of this Motion, the Court should order a new trial based on the jury's inconsistent finding of securities fraud under § 10(b) based on defendants' promising to give UIH 10% of the cable project with no intention of doing so, and its finding that defendants had in fact contracted to give UIH that same 10% share.

(f) Lacking federal jurisdiction, plaintiffs' state law claims should be dismissed because those claims substantially predominate over plaintiffs' federal securities claims and the

exercise of supplemental jurisdiction is not appropriate under 28 U.S.C. § 1367(c).

5. Judgment Should Be Entered for Defendants, or a New Trial Ordered, on Each of Plaintiffs' Claims Because of Legal Insufficiencies in the Evidence and Errors in the Court's Instructions and Evidentiary Rulings.

(a) For the reasons stated in Paragraph 4(b) of this Motion, the Court should enter judgment for defendants or order a new trial on plaintiffs' breach of contract claim because there was legally insufficient evidence for the jury to find an enforceable oral contract.

(b) For the same reasons that there was no contract to support UIH's breach of contract claim, the Court should enter judgment for defendants or order a new trial on plaintiffs' claim for breach of fiduciary duty. There was no legally sufficient evidence proving the existence of a joint venture agreement giving rise to a fiduciary duty on the part of the defendants because the objective evidence demonstrated that both parties, or at least defendants, contemplated that they would not be bound by any agreement until a formal written contract was finalized, approved and signed. The parties' actions and statements throughout their course of dealings demonstrated that they understood such a signed agreement was required. In addition, no reasonable jury could have found there was ever a meeting of the minds or certainty on all essential terms of the alleged joint venture or that all conditions precedent to its formation and performance were met.

(c) The Court should enter judgment for defendants or order a new trial on plaintiffs' fraud-related claims under Colorado common law because the evidence and all inferences to be drawn therefrom demonstrated that defendants' conditions precedent to any investment rights on the part of plaintiffs were fully disclosed to UIH. Because these conditions were fully disclosed, there was no legally sufficient evidentiary basis for any finding of misrepresentation or

omission by defendants, nor any reasonable reliance by plaintiffs.

(d) For the same reasons stated in the preceding subparagraph (c) and in Paragraph 4 of this Motion, the Court should enter judgment for defendants or order a new trial on plaintiffs' federal and Colorado securities law claims. There was also no legally sufficient evidence that defendants acted with scienter, which is a required element of the securities law claims.

(e) The Court should enter judgment for defendants or order a new trial because, absent a primary violation of the securities laws, there was no legally supportable basis for plaintiffs' "control person" claims under § 20(a) of the Securities Exchange Act and C.R.S. § 11-51-604(5)(b). The evidence also failed to establish that Wharf Holdings and WCIL acted in bad faith and induced the primary violations of the securities laws.

(f) Alternatively, a new trial should be granted on each of UIH's claims because of the errors in the Court's instructions and evidentiary rulings. Among other things:

(i) The Court erred in rejecting Defendants' Proposed Instruction No. 42A and in failing to instruct the jury on the applicable statute of frauds.

(ii) The Court erred in rejecting Defendants' Proposed Instruction No. 42 and in failing properly to instruct the jury that there could be conditions precedent to the formation of a contract in addition to its performance.

(iii) The Court erred in rejecting Defendants Proposed Instruction No. 47 and in failing to clarify that the requirements for a joint venture agreement were the same as those for any other contract and that the formation of such an agreement may be subject to conditions precedent.

(iv) The Court erred in rejecting Defendants' Proposed Instruction No. 3.1.5 and in failing properly to instruct the jury regarding the meeting of the minds required for a contract. The Court's Instruction No. 37 misstated the law by not specifying that an "agreement to agree" in the future is unenforceable and is not the same as "merely discuss[ing]" entering into a contract.

(v) The Court erroneously admitted evidence of UIH's subjective intent that documentation was not needed for the "oral option," when only objective statements and actions of the parties are relevant.

(vi) The Court erroneously admitted speculative testimony by UIH witnesses about what would have happened if UIH had known of Wharf's conditions to the formation and performance of any agreement.

(vii) The Court erroneously precluded testimony from defendants' expert Edward Liebst regarding errors in plaintiffs' valuation of a 10% interest in the Wharf cable project, the nature, extent and value of the services provided by plaintiffs' and the development costs associated with pursuing a media investment.

WHEREFORE, for the foregoing reasons, defendants respectfully request that the Court:

A. Enter an order pursuant to Rule 50, Fed. R. Civ. P., setting aside the jury's verdicts and entering judgment as a matter of law in defendants' favor on each of plaintiffs' claims.

B. Alternatively, order a new trial under Rule 59, Fed. R. Civ. P.

C. Alternatively, enter an order and amended judgment: (1) disallowing the jury's award of exemplary damages, reducing the excessive amount of those damages, or conditioning denial of defendants' motion for a new trial on plaintiffs' acceptance of a reduction of the excessive amount of

those damages; (2) reducing the jury's excessive award of compensatory damages, or conditioning denial of defendants' motion for a new trial on plaintiffs' acceptance of a reduction in the jury's excessive award of compensatory damages; (3) excluding the awards of prejudgment interest and attorneys' fees to plaintiffs; and (4) entering judgment for either UIH or UIH Asia only.

DATED: June 5, 1997 Respectfully submitted,

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APPENDIX K

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF THEIR POST-TRIAL MOTION PURSUANT TO FED. R. CIV. P. 50 AND 59, FOR JUDGMENT AS A MATTER OF LAW, FOR A NEW TRIAL AND FOR OTHER RELIEF, FILED JULY 25, 1997

FILED
U.S. DISTRICT COURT
DISTRICT OF COLORADO

'97 JUL 25 P4:21

JAMES R. MANSPEAKER
CLERK

THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Civil Action No. 94-K-2560

UNITED INTERNATIONAL HOLDINGS, INC., et. al.,

Plaintiffs,

v.

THE WHARF (HOLDINGS) LIMITED, et. al.,

Defendants.

DEFENDANTS' ("WHARF") REPLY MEMORANDUM IN SUPPORT OF THEIR POST-TRIAL MOTION FOR JUDGMENT AS A MATTER OF LAW, FOR A NEW TRIAL, AND FOR OTHER RELIEF

INTRODUCTION

Any objective observer knows that, whatever may be UIH's "knowledge, skill, expertise, reputation and connections" (*see* UIH's Opposition to Defendants' Post-Trial Motion ("Opp.") p. 2), they provide no rational legal, evidentiary or economic basis for judgment of $153.7 million, *plus* attorneys' fees and costs that have yet to be determined,

plus post-judgment interest that is accumulating at over $740,000 monthly.

The stark and undisputed fact is that UIH's only contribution to the Wharf project was stipulated to have cost it less than $1 million. *See* 3/14/97 Stipulation Regarding Expenses Incurred. A recovery of over 1530% on that modest contribution to Wharf's half-billion dollar undertaking is plainly beyond the pale, particularly when UIH never paid, or even committed to pay, dollar one toward the purchase of shares in the project.

UIH always regarded its relationship with Wharf as a one-way street — the "option, but not the obligation" to buy in. Complaint ¶ 54. As Mark Schneider wrote to his father and William Elsner when the parties began serious negotiations in June 1992: "The bad news is we need $40 million by next year, but we have a lot of time to work through business plans and there will be ways out of the deal depending on approval, etc." TX 237.[1] That remained UIH's position throughout. Gene Schneider conceded that the proposed Wharf investment had to be approved by UIH's Board; that it never did so; and that the Board always retained the right to say "no." Tr. 3496-98.

For this and other compelling reasons, Defendants' Post-Trial Motion ("Mot.") urges this Court to set aside the judgment in this case. Consistent with what defendants stated when they filed their Motion, this Reply will not reargue points that have already been adequately presented, either orally or in writing. Instead, defendants will focus on responding to arguments made in UIH's Opposition — particularly relating to each of the three major components of the damages award — demonstrating that defendants' grounds for setting aside those

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[1] Tabs, trial exhibit and trial transcript excerpts cited herein are contained in defendants' separately filed Appendix to this Reply Memorandum (transcript excerpts are found at Tab C).

awards are soundly based, while UIH's opposition is without merit.

I. BASED ON THE COLORADO EXEMPLARY DAMAGES STATUTE AND FEDERAL DUE PROCESS, THE COURT SHOULD DISALLOW THE EXEMPLARY AWARD

Defendants' Post-Trial Motion asks this Court as an initial matter to disallow or substantially reduce the $58.5 million exemplary award pursuant to C.R.S. § 13-21-102(2), which permits the courts to "reduce or disallow the award of exemplary damages to the extent that:

> "(a) The deterrent effect of the damages has been accomplished; *or*
>
> "(b) "The conduct which resulted in the award has ceased; *or*
>
> "(c) The purpose of such damages has otherwise been served." *Id.* (emphasis added).

UIH argues in opposition that the award should not be overturned because it represents the jury's assessment "as the voice of the community of the measure of punishment that Wharf deserved." Opp. 10. The Colorado legislature is at least as important a "voice of the community," however, and the statute was clearly designed to give judges broad discretion to set aside or reduce a jury's award where *any* or three alternative grounds exist. Here, the record demonstrated that *all* of those grounds are present. Moreover, the serious constitutional issues raised by the exemplary award add a further reason for setting it aside.

A. The Exemplary Damages Award Should Be Disallowed Or Reduced Under C.R.S. § 13-21-102(2) Because All Three Conditions In The Statute Have Been Met.

As Wharf's Post-Trial Motion points out (pp. 2-3), each of the alternative bases for invoking the Colorado statute exists in this case:

> (i) the deterrent effect of such damages has been accomplished by the staggering award of compensatory damages, plus prejudgment interest and attorneys' fees and costs; (ii) the conduct which resulted in the award has ceased, and there is no risk of continued or repetitious conduct; and (iii) the purpose of such damages has otherwise been served because there is no threat to public safety or health, only an isolated economic injury, and there s no evidence that exemplary damages are needed to deter Wharf Holdings or others from acting similarly in the future, either in Colorado or elsewhere.

UIH's Opposition does not discuss, much less dispute, that the second ground for disallowing the award has been met; namely that the conduct which resulted in the exemplary award ceased long before the trial commenced. At trial, UIH only complained of Wharf's actions in contract negotiations and related business dealings that occurred during the period from mid-1992 to March 1994. In fact, UIH successfully argued that evidence concerning events after March 18, 1994 was completely irrelevant. Accordingly, this case bears no resemblance to those where the public health or safety is threatened by the continuing sale of a defendant's defective or injurious product.

UIH nonetheless asserts that "nothing in the record suggests that Wharf will not repeat its misconduct in the future." Op. 11. Its only support for this speculation is that Wharf had *past* dealings with US West, TCI and SecaGraphics. *Id.* This does not alter the fact that the conduct at issue here has undeniably ceased, and that is sufficient to invoke the second clause of C.R.S. § 13-21-102(2) (b). Furthermore, the record shows that Wharf's past dealings with the three

Colorado companies were entirely proper. The very trial exhibits appended by UIH to its Opposition reflect nothing less than a glowing relationship with SecaGraphics. *E.g.*, TX 851 at 1, 3 ("SecaGraphics enjoyed very much our participation in the Hong Kong project and we would enjoy being involved with . . . Wharf Cable in any way . . . SecaGraphics sincerely looks forward to working with our friends at Wharf once again"). As for US West and TCI, they were the ones who dropped out of participating in a Hong Kong cable project, not Wharf.

Although compliance with the second clause of §13-21-102(2) would be sufficient to satisfy the statute, the other two clauses are also met. As UIH notes, the goals of exemplary damages are "[t]o punish the defendant and to set an example" so as to deter the future commission of similar offenses by the defendant and others. Opp. 10; *see Lexton-Ancira Real Estate Fund, 1972 v. Heller*, 826 P.2d 819, 822 (Colo. 1992). Here, these goals have been accomplished many times over solely by the magnitude of the $67 million compensatory award. According to press reports, the size of that award alone makes it the largest jury verdict in Colorado history. *See* John Accola, *Cable-TV Firm Wins $125.5 Million*, Rocky Mountain News, April 30, 1997, at 4A. (Tab A) In addition, this Court awarded UIH $27.5 million in prejudgment interest. Thus, the compensatory damages and prejudgment interest awarded against Wharf Holdings, even without any exemplary damages, is close to $95 million.

UIH's Opposition ignores that an award of compensatory damages, and particularly one the size of the award here, serves *both* a compensatory and an admonitory function. As the Colorado Supreme Court has explained:

> [W]hile a compensatory damages award serves the reparative function of making the injured party whole, it also performs the secondary function of discouraging 'a

> repetition of [the defendant's] wrongful conduct' by serving as a 'warning to others who are inclined to commit similar wrongs.'

Kirk v. Denver Publ'g Co., 818 P.2d 262, 265 (Colo. 1991) (quoting C. Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1177 (1931)).

This Court also awarded UIH attorneys' fees in an amount to be determined in accordance with the procedure set forth in the Court's Order of May 15, 1997. Since the American rule is that each party bears its own attorneys' fees, this award under the Colorado Securities Act adds both to the deterrent effect of the verdict and is itself a form of penalty. *See Ortivez v. Davis*, 902 P.2d 905, 909-10 (Colo. Ct. App. 1995) (referring to attorneys' fees as a form of "penalty" as that term is used in the Colorado statute governing the retroactive effect of statutory amendments).

UIH's Opposition does not discuss or dispute that the punishment objective of exemplary damages has already been fully achieved by the award of sizable compensatory damages, prejudgment interest, and attorneys' fees. Rather, UIH makes the indefensible argument that deterrence has not been accomplished because defendants have denied any wrongdoing and plan to appeal. Opp. 11. Defendants have every right to contest the allegations made against them and to appeal from a judgment that they genuinely believe cannot, and should not, be sustained. Moreover, UIH ignores the undisputed fact that Wharf offered to compensate UIH for its efforts in support of the cable TV project, but UIH refused, preferring to litigate. In this regard, the jury found the maximum "value" to Wharf of UIH's efforts was only $8.1 million. *See* Verdict Form 1 at ¶ 18.

Consequently, nothing in UIH's Opposition alters the fact that *all* of the grounds for completely disallowing the exemplary award under C.R.S. § 13-21-102(2) are present here. Even if this Court believes that some exemplary award is in

order, a much smaller and more reasonable amount can serve the goals of deterrence and punishment. This point is reinforced by the Court's recent award of exemplary damages in *University of Colorado Foundation, Inc. v. American Cyanamid Co.*, No. 93-K-1657 (D. Colo. July 7, 1997). There, Your Honor awarded the plaintiffs $44,396,159 in compensatory damages on their fraud claim, but only $1 million in exemplary damages. This was despite the Court's finding regarding "Cyanamid's cynical disregard of these [plaintiff] doctors as scientists." *Id.* at 48.

> When Cyanamid recognized the profit that could be made, it pillaged the doctors' invention as so much booty. This conduct is not merely a question of stepping over the line; it is a departure from the game itself. The amount of the reasonable punitive damages awarded each [doctor] is $500,000. *Id.* at 48-49.

In short, this Court determined that the goals of deterrence and punishment would be adequately achieved by an exemplary award of $1 million against a Fortune 500 company that the Court described as "a leviathan in [the] industry." *Id.* at 46. Here, if any exemplary damages are thought to be appropriate by the Court, defendants respectfully submit they should not exceed the amount in *Cyanamid*.[2]

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[2] UIH is wrong that C.R.S. § 13-21-102(1)(a) authorizes the jury to award exemplary damages "in any amount up to the amount of actual damages," and that "the jury's determination of damages is considered inviolate." Opp. 4. UIH ignores the statute's overarching mandate that any award of exemplary damages must be "reasonable" regardless of the size of the compensatory award. Furthermore, the jury's determination of the amount of punitive damages is not given the same degree of deference as purely factual findings receive. The Fourth Circuit recently confirmed that "the judgment a jury makes as to the amount [of punitive damages] is reviewable by federal trial courts under Federal Rule of Civil Procedure 59 less deferentially than are factual findings which may be measured against

B. An Order Of Remittitur Or For A New Trial Should Be Entered Because The Award Of Exemplary Damages Violates Due Process.

In addition to the restraints on punitive awards that are imposed by relevant state law, a punitive award must comply with the Due Process Clause's "general concern" for "reasonableness." *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993). This concern requires that the awards be "rational in light of [its] purpose to punish what has occurred and to deter its repetition." *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 20-21 (1991). Accordingly, as urged in Wharf's Post-Trial Motion (p. 4), the Court should substantially reduce the award of exemplary damages because its magnitude and extraterritoriality violate Due Process.

Contrary to UIH's implication, the "ratio" of the amount of exemplary damages to compensatory damages is not the sole measure of excessiveness. Opp. 12. Rather, the reasonableness of a punitive award for purposes of Due Process turns on several factors, including the harm inflicted on the plaintiff and the likely potential harm to others arising from the complained of conduct. *See TXO*, 509 U.S. at 458-60; *BMW of North America, Inc. v. Gore*, 116 S. Ct. 1589, 1598-99 (1996).

In striking down an unreasonable award of punitive damages, the Supreme Court noted in *BMW* that the "harm BMW inflicted on Dr. Gore was purely economic in nature," and that BMW's actions "evinced no indifference to or reckless disregard for the health and safety of others." *BMW*, 116 S. Ct. at 1599; *see also Utah Foam Prod. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531-32 (D. Utah 1996) (remittitur of punitive damages in fraud case based, in part, on fact that damages were wholly economic and conduct did not have any safety implications). Here, the fact that the claimed one-time injury

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the factual record." *Atlas Food Sys. and Serv., Inc. v. Crane Nat'l Vendors, Inc.*, 99 F.3d 587, 595 (4th Cir. 1996).

affected only UIH, was purely economic in nature, and presented no threat to public health or safety, all support the conclusion that the $58.5 million exemplary award is excessive.

UIH's Opposition also ignores *BMW's* third indicium of excessiveness, which involves "comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable conduct." 116 S. Ct. at 1603. In *BMW*, the Supreme Court noted that "the $2 million economic sanction imposed on BMW [was] substantially greater than the statutory fines available in Alabama and elsewhere for similar malfeasance." *Id.* Here, the Colorado Securities Act provides that even a willful violation of C.R.S. § 11-51-501 may be punished by a fine which may not exceed $750,000. *See* C.R.S. § 11-51-603 and C.R.S. § 18-1-105. Accordingly, under the *BMW* analysis, Wharf Holdings did not have fair notice that its alleged conduct might subject it to a $58.5 million exemplary damages award in Colorado.

In addition, the Supreme Court emphasized in *BMW* that an award of punitive damages must be supported by a state's "interest in protecting its own consumers and its own economy." 116 S. Ct. at 1597. The Tenth Circuit recently held that the *BMW* decision "prohibit[s] reliance upon inhibiting unlawful conduct in other states" when ruling on whether a punitive damages award is excessive. *Continental Trend Resources, Inc. v. OXY USA, Inc.*, 101 F.3d 634, 637 (10th Cir. 1996). A proper punitive damages award therefore "must relate to conduct occurring within the state." *Id.* at 636.

In this case, virtually all of the conduct complained of occurred in Hong Kong or other places *outside* of Colorado. UIH nonetheless claims that Colorado has an interest because Wharf's wrongful conduct "was directed at UIH in Colorado," and resorts to the fanciful metaphor that Peter Woo sent Stephen Ng to Colorado on October 8, 1992, "as if he were firing a gun into the state." Opp. 14. UIH also argues that due

process does not prohibit courts from generally redressing wrongful conduct by nonresident defendants. *Id.* at 13. However, the relevant focus for the federal excessiveness inquiry under *BMW* is on the conduct and where it occurred. The Supreme Court was specifically concerned about limiting punitive damage awards that were "based in large part on conduct that happened in other jurisdictions." 116 S. Ct at 1597-98. Accordingly, the exemplary award here violates due process because the vast majority of the alleged wrongful conduct did not occur in Colorado, nor affect its economy or any of its resident other than UIH.

UIH is also wrong that Wharf received adequate notice of the severity of the penalty that Colorado might impose through prior case law. Opp. 16. Wharf has always believed that, because the parties intended Hong Kong law to apply and because the locus of their business relations was overwhelmingly in Hong Kong, Hong Kong law would govern their relationship. This means that Wharf could not have expected exemplary damages, and their imposition is particularly disturbing because Colorado's exemplary damages statute has been applied extra-territorially.

For all of these reasons, if this Court does not exercise its discretion under C.R.S. § 13-21-102(2) to disallow the award of exemplary damages, it should at a minimum reduce that award to a constitutionally permissible amount.[3]

C. An Award Of Exemplary Damages Requires A Showing Of Extreme Conduct Under An Extremely Heavy Burden Of Proof That Was Not Met.

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[3] Wharf recognizes that, if the Court determines that the exemplary award is excessive under a Due Process analysis, it may not unilaterally reduce the award. Rather, the Court should issue an order of remittitur, which conditions denial of defendants' motion for a new trial on plaintiffs' acceptance of a reduction in the amount of the damages awarded. *See Continental Trend*, 101 F.3d at 643.

With little citation to the record, UIH contends that the criteria of C.R.S. § 13-21-102(1)(a) were satisfied and that the evidence was "more than sufficient to establish the 'circumstances of fraud' required for punitive damages . . . and the evidence was sufficient for the jury to make this finding beyond a 'reasonable doubt.'" Opp. 3. Likewise, UIH asserts that the evidence demonstrated "beyond a reasonable doubt" that Wharf "acted with 'malice' and/or . . . 'willfully' and 'wantonly'" violated UIH's rights. *Id.*

Both the Tenth Circuit and the Colorado Supreme Court have made clear, however, that punitive damages are not to be lightly awarded. They construe the language of the Colorado statute to allow an award of exemplary damages only when "the acts causing the injury were performed 'with an evil intent and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive.'" *Orjias v. Stevenson*, 31 F.3d 995, 1012 (10th Cir. 1994); *see also Kirk v. Denver Publ'g Co.*, 818 P.2d 262, 270 (Colo. 1991) (exemplary damages are "only available when a civil wrong has been committed under extremely aggravating circumstances").

Furthermore, Colorado law imposes an extremely high burden of proof with respect to the evidence necessary to demonstrate an "evil intent" or "wrongful motive." They must be established "beyond a reasonable doubt." C.R.S. § 13-25-127. Importantly, Colorado is the only state in the nation which uses the "beyond a reasonable doubt" standard for exemplary damages, demonstrating the legislature's manifest intent that such damages can only be awarded in extraordinary cases. *See* Linda Schlueter, *Punitive Damages*, § 5.3(H)(3) at 285 (Michie 1995) (Tab B).[4]

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[4] As the Colorado Supreme Court noted in *Tri-Aspen Const. Co. v. Johnson*, 714 P.2d 484 (Colo. 1986), "[t]he reasonable doubt burden is by definition a heavy one, an we have determined that proof was insufficient to carry that burden on several occasions in the past." *Id.* at 484. Awards

Notwithstanding the extravagant hyperbole used by UIH in its discussion of the liability record, Opp. 2-3, 13-14, Wharf will not respond by rearguing at length the evidence at trial. Suffice it to say that, regardless of whether the evidence supported the jury's fraud and breach of fiduciary duty verdicts, it did not come close to meeting the heavy burden of proving the requisite "evil intent" or "wrongful motive" beyond a reasonable doubt.[5] On the contrary, the evidence showed that Wharf Holdings repeatedly disclosed to UIH the conditions on any investment in the Wharf cable project. *See* Mot. 12, 14.

At most, the record showed a misunderstanding between the parties, not anything "evil" or "wrongful." The correspondence written by William Ng during late 1993 through the March 1994 board meeting is a good illustration. As an owner and officer of UIH Asia, William Ng was plainly in a position to know whether plaintiffs truly believed that they had a deal with Wharf upon which they had relied. His written

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of exemplary damages will be set aside where this heavy burden of proof is not met. *See Alley v. Gubser Dev. Co.*, 785 F.2d 849, 855 (10th Cir. 1986) (reversing exemplary damages award in formaldehyde products liability action where no reasonable jury could find the requisite circumstances beyond a reasonable doubt); *see also Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341 (10th Cir. 1986) (affirming decision to overturn jury's award of exemplary damages where plaintiff did not meet the "heavy burden" imposed by the Colorado statute).

[5] *Cf. Vaske v. DuCharme, McMillen & Assocs.*, 757 F. Supp. 1158, 1166 (D. Colo. 1990) (granting defendants summary judgment as to exemplary damages where plaintiff offered no evidence defendants' actions were committed with an evil intent and with purpose to injure plaintiff or a willful, wanton or reckless disregard of plaintiffs' rights); *Farmers Group, Inc. v. Trimble*, 768 P.2d 1243, 1248 (Colo. App. 1988), *overruled on other grounds, Bernhard v. Farmers Ins. Exch.*, 915 P.2d 1285, 1290 (Colo. 1996) (trial court correctly refused to submit exemplary damages issue to jury in bad faith breach of contract case where evidence established defendant's actions were unreasonable, but plaintiff failed to show beyond a reasonable doubt that those actions were wanton or in reckless disregard of plaintiffs' rights and feelings).

statements at the time – not *ex post facto* fabrications – establish that UIH obviously knew that it still needed a written agreement approved by Peter Woo and Wharf's Board.

On October 21, 1993, for example, William Ng wrote Stephen Ng: "I will appreciate if you could arrange a meeting for us to hang our heads together and come upon with the MOU acceptable to your Board," hardly the words of someone who thought he already had a deal. *See* TX 1285. The following month, William Ng wrote Peter Woo with a similar message after their meeting at station launch:

> We believe that we could continue to contribute strategically and effectively to Wharf Cable and it is my contention that UIH will be the right partner to bring significant value to the table in the years ahead. . . . UIH Inc. looks forward to receiving your blessings to take up equity in Wharf Cable Limited soon. TX 1318.

Then, shortly before the final March 1994 meeting, William Ng wrote Mark Schneider confirming once again that no contract existed:

> You will be meeting with the Wharf Group on March 17 and 18 and it could be your final opportunity to persuade Peter Woo to give UIH Asia a 10% partnership . . . . My feedback is that, to-date Peter Woo is not convinced that UIH Asia could bring added value to the Wharf set up. . . . So, my conclusion is that Wharf does not need us – rather we need their blessings to be their equity partner – now that the network is in place and things are moving forward. TX 1369.

William Ng's letters in late 1993 and early 1994 are just some among a large body of examples that refute any notion that the prerequisites to an exemplary award were shown *beyond a reasonable doubt.*

II. THE COMPENSATION AWARD SHOULD BE DISALLOWED OR SUBSTANTIALLY REDUCED AS GROSSLY EXCESSIVE AND UNSUPPORTED BY LEGALLY SUFFICIENT EVIDENCE

Defendants' Post-Trial Motion urges (p. 7) that this Court should enter judgment for defendants or order a new trial "because the jury's award of damages to compensate plaintiffs for the loss of their alleged 'option' to invest in the Wharf cable project [is] grossly excessive" and "not supported by legally sufficient evidence." It is axiomatic that a compensatory award that is either grossly out of line with a plaintiff's economic injury or that is unsupported by competent evidence must be set aside. *E.g.*, *Thompson v. Shelter Mut. Ins.*, 875 F.2d 1460, 1463 (10th Cir. 1989). This applies with special force to an award based, as here, on evidence of allegedly lost future profits by a start-up enterprise where the calculation is too conjectural to be ascertained. *Western Cities Broadcasting v. Schueller*, 849 P.2d 44, 50 (Colo. 1993); *Web v. Utah Tour Brokers Ass'n*, 568 F.2d 670, 677 (10th Cir. 1977).

A. UIH's Evidence Was Insufficient To Prove the Value of Its Alleged "Option."

There is no dispute that, whatever UIH's various legal theories might be, the gravamen of its injury was always that Wharf backed out on its "promise," "representation" or "agreement" to give UIH an option to purchase 10% of the Wharf cable project. That was what was alleged in Paragraphs 51 to 55 of the Complaint. It was what UIH told the Tenth Circuit on the arbitration appeal. *See United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 76 F. 3d 393, 1996 WL 55656, *2 (10th Cir.) (describing UIH as "claiming that [defendants] had breached an oral contract giving plaintiffs an

option to purchase a 10% interest in . . . Wharf Cable's parent"). And that was how this Court described the case in its summary judgment ruling and at trial. *See United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 946 F. Supp. 861, 864 (D. Colo. 1996) ("UIH claims it was promised an option to purchase a 10% equity interest in Cable"); Tr. 5044 ("[T]his is an option case"). Yet, when UIH got around to introducing its damages evidence, it shifted its position and treated the case as if it had lost a 10% *stock ownership* interest in the cable project, not an *option* to purchase such an interest.

UIH's Opposition tries to hide this crucial switch with the same prestidigitation it practiced so successfully on the jury. UIH goes on at length describing the intricate statistical manipulations of its expert, Robert Jones, and his seconder, Joseph Bowles. Opp. 4-10. UIH cannot escape, however, that Jones's valuation exercise was directed to the wrong end; he did not value the option, but a 10% interest in the project:

> Q: Now, what you valued, though was not the value of an option to buy ten percent, instead you valued the ten percent ownership; did you not?
>
> A. (By Mr. Jones) I valued a ten per cent economic interest of CNCL. Tr. 6228.

Further proof that Jones valued a 10% ownership interest and not the "option," is provided by a closer look at his flawed valuation methodology. Jones' basic flaw was his failure to compute and deduct the option price from his valuation of UIH's alleged 10% interest in the Wharf Cable project. UIH's theory of the case was that it was deprived of the value of its "option" to purchase 10% of the stock in the Wharf Cable project upon UIH's payment of an option price of 10% of the equity capital of the project. In a case alleging a deprivation of an option, "the proper measure of damages is the difference between the market value of the stock and the option price."

Hermanowski v. Acton Corp., 729 F.2d 921, 922 (2d Cir. 1984).[6]

Here, however, Jones did not value UIH's alleged option. Rather, he valued only UIH's alleged 10% stock interest in the Wharf Cable project. *See* Tr. 6070-83. Contrary to plaintiffs' argument in closing, *see* Tr. 7945, Jones did not determine the price UIH had to pay to exercise its option or deduct that option price from the value of UIH's alleged 10% interest in the project. Jones' study was limited to a discounted cash flow ("DCF") analysis of the enterprise value of the Wharf Cable project and UIH's 10% interest in it.

In Jones' DCF analysis of the value of the Wharf Cable project, he simply calculated all of the project's revenues and expenditures over a ten-year period, subtracted the expenditures from the revenues, and discounted the excess of revenue over expenses to present value. In calculating an enterprise's expenditures in a DCF analysis, the appraiser adds up all of the expenditures whether they are current expenditures or capital expenditures. Jones' deduction of capital expenditures in this case was a necessary step in determining the enterprise value of the Wharf Cable project. It was *not* an estimate of the "option price" which UIH was obligated to pay for its 10% interest in the project. Accordingly, UIH's proof of damages is fatally defective in its failure to deduct the price which UIH was obligated to pay upon exercise of its option from the value of UIH's alleged 10% interest in the Wharf Cable project.

The pivotal difference between the value of an option and the value of the underlying stock interest is well recognized in the law. *See, e.g., Helvering v. San Joaquin Fruit & Inv. Co.*,

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[6] Defendants have always maintained that Hong Kong law should have governed UIH's claims and that it is the appropriate law for determining the measure of damages for breach of contract, misrepresentation and fraud. Although Hong Kong law controls, the principle stated in *Hermanowski* is consistent with Hong Kong law, which reinforces the flaw in Jones' analysis.

297 U.S. 496, 498 (1936) (option does not transfer interest in property, until exercised, so optionee's cost basis was exercise price, not the value of the underlying asset); *Gurware v. Lyphomed, Inc.*, 937 F.2d 380, 382 (7th Cir. 1991) (pointing out difference between value of option to purchase stock and value of stock itself). The importance of the distinction was put in sharp relief by the trial evidence that UIH's own investment bankers and its principal partner assigned no or minimal value to the alleged option. Dvorak, Tr. 3157; TX 1358, p. 12.

Finally, Jones valued UIH's fraud damages as being $50 million as of October 1992 and UIH's contract damages as being $67 million as of March 18, 1994. The jury's award of $67 million in damages arising from UIH's claims of fraud, securities violation and breach of fiduciary duty is therefore unsupported by any competent evidence.

As noted, the essence of these claims is that defendants falsely promised that they would give UIH an option to purchase a 10% interest in the Wharf Cable project never intending to do so. The alleged false promise was made in October of 1992 and plaintiffs' expert valued UIH's damages as of October 1992 at $50 million. Pursuant to the instructions, the jury was required to determine the fraud and breach of fiduciary duty claims as the difference between the value of the property as represented (claimed by Jones to be $50 million) and the fair market value of the property as it actually was (claimed to be zero in light of Wharf's alleged intention not to allow UIH to exercise its alleged option).

In this case, plaintiffs alleged that defendants falsely promised to give UIH an option to purchase 10% of the stock of the Wharf Cable project in October 1992. The only evidence provided by UIH of the damages sustained as of October 1992 is Jones' claim that UIH was deprived of its alleged 10% interest in the Wharf Cable project, valued at $50 million at that time. Accordingly, the jury's verdict awarding UIH

damages of $67 million on its consumer law fraud, securities and breach of fiduciary duty claims should be vacated as unsupported by evidence.

B. UIH Improperly Relied on Speculative Future Profits From a Start-Up Business.

The absence of a legally supportable basis for the compensatory award was compounded by the fact that the Jones/Bowles valuation approach rested entirely on a projection of future profits by a start-up enterprise that had no operating or financial history. However, *King v. U.S.*, 292 F. Supp. 767, 776 (D. Colo. 1968) emphasized nearly three decades ago that:

> [A]nticipated profits from a business which is contemplated but not established are too remote and speculative to furnish a basis for the award of damages. Loss of profits can be considered, according to the Court, only when the business has been in existence and has a profit history.

See also Reece v. Calvert Asset Management Co., Inc., 1987 WL 28590, *3 (D. Colo. 1987) (disallowing lost profits for a new business because the evidentiary standard "can only be met by looking to the prior history of an established and long standing business"). The Tenth Circuit explained the rationale for this rule in *Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511 (10th Cir. 1987). Future profit calculations for start-up businesses tend to rely, as in this case, on expert evaluations of financial projections, costs, expenses and discount rates "conveying a delusive impression of exactness in an area where a jury's common sense is less available than usual to protect it." *Id.* at 514.

Two recent cases from the Colorado Supreme Court and the Tenth Circuit illustrate the application of these principles in factual contexts that parallel the present case. In *Western Cities Broadcasting v. Schueller*, 849 P.2d 44 (Colo. 1993), plaintiff had leased a radio tower from the defendant in order to begin

broadcasting a new radio station. After the tower failed to work properly, plaintiff sued for fraud and negligent misrepresentation seeking damages for lost profits. The Court of Appeals disallowed the jury's award of $3.74 million on the ground that "evidence of the projected value was insufficiently certain or reliable, *as a matter of law*, to enable the trier of fact to arrive at a fair approximation of the value of the leasehold. . . ." *Id.* at 47 (emphasis added). In affirming, the Supreme Court held:

> [T]he only evidence [plaintiff] presented regarding lost profits was the testimony of [its expert econometrician] who based his calculations on a hypothetical FM radio station operating at full power in the Denver area. . . . Given the fact that the actual radio station . . . had no significant past operating history, had never made a profit before, had failed to provide evidence of actual lost business opportunities, and could provide no evidence other than [the expert's] hypothetical models . . . [the] evidence [is] too speculative to go to a jury. *Id.* at 50.

The Supreme Court stated that plaintiff could claim for its out-of-pocket expenses, but that the lost profits were too speculative to be upheld. *Id.* at 50, n. 9.

Equally instructive is *TK-7 Corp. v. Estate of Barbouth*, 993 F.2d 722 (10th Cir. 1993), which disallowed damages for lost profits from a joint venture because they were too speculative. The Court found:

> The joint ventures for which the plaintiffs claim lost profits appear to have been little more than concepts in 1987. For example, there was no written agreement outlining the . . . joint venture and only a "letter of intent" as to [another] joint venture. The plaintiffs presented some evidence of the form they believed the proposed joint ventures would take . . . but many of the details were sketchy. There were clearly

> numerous unresolved issues surrounding the establishment of the businesses. . . .[No] evidence was presented of any comparable businesses generating such profits in the foreign markets. In sum, the evidence as a whole reinforces the conclusion that the plaintiffs failed to meet their burden of showing damages with reasonable certainty. *Id.* at 735.

So here, the Wharf Cable project was no more than an unproven concept in 1992, with no profit or operating history; there was no written agreement between UIH and Wharf detailing the proposed joint venture; numerous financial, control and management issues remained to be resolved; there were no cable facilities, subscribers, or programming; and there was no cable TV system of comparable scope and complexity anywhere in the world. In short, UIH utterly failed to meet its burden of showing damages for lost profits with the requisite certainty.

Although UIH was barred from pursuing lost future profits on the record here, it was entitled to compensation for its time and expenses devoted to the project, as in *Western Cities Broadcasting*. These were stipulated to approximate only $900,000, however, and could not support a $67 million compensatory award that was over 76 times greater. Even if the jury's assessment of the value of UIH's services to Wharf were taken as the measure, the jury valued them at only $8.1 million. Again, this could not conceivably justify a $67 million award.

In the end, UIH cannot mask that it never committed to purchase *any* shares in the Wharf cable project, much less pay out any cash for those shares. Apart from its time and expenses, UIH was never on the hook for anything. Even as to those outlays, UIH took the position it was entitled to reimbursement. TX 1213; TX 1305. In sum, the project was riskless to UIH and does not warrant the grossly excessive award made by the jury.

III. THE AWARD OF PREJUDGMENT INTEREST IS NOT SUPPORTED BY COLORADO LAW

The third major focus of Wharf's Post-Trial Motion is this Court's award of prejudgment interest under C.R.S. § 5-12-102(1), which provides in pertinent part:

> When money or property has been wrongfully withheld, interest shall be an amount . . . at the election of the claimant . . . at the rate of eight percent per annum compounded annually for all moneys or the value of all property *after they are wrongfully withheld or after they become due* to the date of payment or to the date judgment is entered, whichever first occurs. (emphasis added).

The amount is substantial: $28,208,440, or an addition of 42% to the $67 million compensatory award. Unlike the punitive and compensatory damages, however, Wharf's request that the Court reconsider and reverse this award does not implicate any actions of the jury. The issue is solely one of correctly applying Colorado law.

The Colorado courts have made it clear that the prejudgment interest statute is designed to compensate a plaintiff for its lost income from the money or property that is alleged to have been "wrongfully withheld" or is "due." As stated in *Coale v. Dow Chem. Co.*, 701 P.2d 885 (Colo. Ct. App. 1985), "The interest is . . . awarded to indemnify the plaintiff for the *loss of earnings* on that money due to its delayed payment." *Id.* at 890 (emphasis added). An important corollary is that pre-judgment interest is not awarded if the plaintiff has only a future right to any income from the money or property. *Shannon v. Colo. School of Mines*, 847 P.2d 210, 213 (Colo. Ct. App. 1992) ("The plain language of this statute

indicates, however, that prejudgment interest is allowed only on past losses.").[7]

The application of these principles is well-illustrated by *Shannon*. Plaintiff sued his former employer for breach of contract to recover lost wages and employee benefits. The jury awarded the employee $400,000 in compensatory damages, but did not specify what part covered past, present or future losses. The Court of Appeals reversed the trial court's award of prejudgment interest on the entire amount, holding that the employee was not entitled to prejudgment interest unless the money was "due and owing prior to the date of payment or prior to the date judgment is entered." *Id.* at 213.

> Simply put, since future wages are not due, there is no delay in the receipt of the money, and therefore, a plaintiff does not experience a loss on such earnings. *Id.*

See also Life Care Ctr. of Am., Inc. v. East Hampden Assoc. Ltd. Partnership, 903 P.2d 1180, 1189 (Colo. Ct. App. 1995), which held the trial court erred by awarding prejudgment interest on both past and future damages. "[W]e include the trial court's award of prejudgment interest must be reversed and award of prejudgment interest entered on only those damages incurred prior to the entry of judgment." *Id.* at 1189.[8]

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[7] Indeed, these cases comport with the legislative history of C.R.S. § 5-12-102. *See, e.g.*, Tape Recording of Testimony before Senate Judiciary Committee on Sen. Bill 463, April 18, 1979, 52nd General Assembly.

[8] UIH gives short shrift to the purposes of the Colorado statute, merely "incorporat[ing] by reference its May 13, 1997 brief on this issue." Opp. 22. That brief's only discussion of the point is its quotation from this Court's decision in *Huffman v. Caterpillar Tractor Co.*, 645 F. Supp. 909, 913 (D. Colo. 1986), *aff'd* 908 F.2d 1470 (10th Cir. 1990), to the effect that, "[p]rejugment interest is . . . used to compensate the plaintiff for the delay inherent in receiving [its money and property] at he time of judgment rather than at the time the claim accrued." Pls. Response to Defs. Objs. to Pls.

UIH seeks to get around the Colorado courts' clear direction that the statute does not apply to lost future earnings by arguing that "the compensatory damage award represents the present value of the property wrongfully with held. It is *not* 'future damages.'" Opp. 22 (emphasis in original). UIH's argument flies in the face of its own theory of the case and the testimony of its witnesses. Even accepting UIH's view of the evidence, all that was ever promised, represented or agreed was that UIH would have the option to purchase 10% of the shares of Wharf Cable or CNCL. There was never any promise, representation or agreement, whether at the October 8, 1992 meeting or any other time, that UIH would have a right to receive any *current* income from those shares. According to Mark Schneider, for example, all that UIH was entitled to under the alleged "option" was "an opportunity to invest." Tr. 880; *see also* Elsner, Tr. 431-32.

The fact that UIH's only damages related to *future* income was bought home by the damage theory espoused by its principal expert. Jones based his entire damage calculation on a projection of Wharf's future revenues, expenses and net profits or losses. Not only did Jones rest his calculation on future returns, he conceded that it takes as least three years in an average cable television protect before revenues surpass expenses. Tr. at 6027-28. In the case of Wharf Cable, Jones based his calculation on its August 1993 Financing Memorandum, which projected that the break-even point would not occur until around 1997 on a free cash flow basis. TX 1250A; TX 1646. Even those projections didn't pan out. The reality is that there will be no net profit before 1999, at the earliest. *See* Defendants' 4/18/97 Offer of Proof.

Proposed Judgment, p.4. Quite apart from the fact that *Huffman* dealt with different issues under a different prejudgment interest statute, there is nothing in this quotation that is inconsistent with the cases cited by Wharf in the text.

Even when Wharf Cable begins to generate a profit, UIH would still have had no present right to receive a share of those profits until dividends were declared. Neither Jones nor anyone else testified to when, or how much, those dividends would be. UIH also introduced no evidence that it either would or could have liquidated its 10% interest prior to 1997 in order to invest the proceeds in a project that would have generated a present return.

UIH is simply wrong when it claims that, "Defendants' arguments about when UIH could 'liquidate' its 10% interest has no relevance or support in the record." Opp. 22. The evidence was undisputed that UIH's plan was to use the Wharf Cable investment as the base for its Far East expansion, and the sale provisions in all of the draft shareholders' agreements, memoranda of understanding and letters of intent made it extremely difficult for UIH to sell its ownership interest at any time prior to seven years. This was recognized early on by UIH's Hong Kong counsel, Sonja Norman, who noted that, "There must be an acceptable liquidity formula for UIH as a minority shareholder available *from year seven (7) onwards*." TX 384 (emphasis added).

In sum, UIH knew it was in a situation where, even if it exercised its "option," it would not be entitled to any current income for several years to come – and certainly not before the May 1997 date of judgment. To award UIH prejudgment interest under these circumstances is to place it in a better position than it would have been in had it actually invested $50 million in the project. What makes this windfall all the more egregious is that UIH never put up that sum, or committed to do so. Rather, UIH had the full benefit of the money during the pendency of this case, and prejudgment interest amounts to a double windfall.[9]

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[9] Should this Court hold to its view that prejudgment interest is proper, the award should only run from late March 1994, because it was not until that point that UIH made a demand for damages. *See Woolley &*

IV. DEFENDANTS ARE ENTITLED TO A NEW TRIAL BECAUSE THE JURY'S VERDICTS ARE RIFE WITH IRRECONCILABLE INCONSISTENCIES

In addition to defendants' challenges to each of the major components of the damages award, their Post-Trial Motion urges (p.4) that, "The Court should order a new trial because here are fundamental inconsistencies in the jury's verdicts." Those inconsistencies pervade the jury's verdicts and undermine the judgment as a whole.

Wharf does not dispute UIH's contention that trial courts have "a duty to *attempt* to reconcile juries' answers to special verdict questions in order to avoid the need for retrials." Opp. 18 (quoting *Palmer v. City of Monticello*, 31 F.3d 1499, 1505 (10th Cir. 1994)) (emphasis added). Nevertheless, the law is well settled that, when a jury returns irreconcilably inconsistent verdicts, courts must order a new trial. *Danner v. Int'l Med. Mktg, Inc.*, 944 F.2d 791, 794 (10th Cir. 1991).

That is precisely what is required here, especially since the inconsistencies place the judgment in conflict with the "economic loss rule" recognized by the Colorado courts and applied by this Court. *See, e.g., Jardel Enter., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301, 1303-04 (Colo. Ct. App. 1988); *Richard O'Brien Co. v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466, 471 (D. Colo. 1987).[10]

Co. v. Bear Creek Manors, 735 P.2d 910, 912 (Colo. Ct. App. 1986) ("Until such time as payment for services is expected or demanded, payment cannot be deemed to have become due and nonpayment cannot be deemed a wrongful withholding"). Likewise, since Jones valued the 10% interest at $50 million as of October 1992 and $67 million as of March 1994, he record does not support a valuation of damages at $67 million as of October 30, 1992 for purposes of computing interest.

[10] Wharf submits that the inconsistencies in the verdicts derive in part from the denial of its request that the instructions should tie the Court's general statement of the law to the specific factual allegations of the case. For example, Instruction Nos. 18 and 19 on fraud provided no assistance as

A. The Inconsistencies In The Exemplary Damages Verdicts Between Wharf Holdings And Wharf Communications And Stephen Ng.

It is impossible to reconcile the jury's finding that Wharf Holdings' conduct "was attended by circumstances of fraud, malice or wilful and wanton conduct," with the jury's finding that the conduct of Wharf Communications and Stephen Ng, the principal actors with the only meaningful contacts with UIH, was not. This fundamental inconsistency is reinforced by Instruction No. 4 that, "[c]orporations can act only through their directors, officers and employees."

UIH tries to gloss over this inconsistency by hypothesizing that the jury might have found that, "Ng essentially was following Woo's orders and that although Ng acted fraudulently, his conduct – viewed in isolation – was not as egregious as Woo's or as Woo's, Ng's and Fung's conduct viewed together." Opp. 18. UIH's hypothesis doesn't fly. In the first place, the jury could not justifiably have relied on the actions of Fung in finding against Wharf Holdings, because UIH's own organization chart showed that he worked for Wharf Communications, not Wharf Holdings. TX 1607.

Second, UIH is re-writing both the record and its consistent theory of the case when it now seeks to cast Peter Woo as the villain, rather than Stephen Ng. From the outset,

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to what the alleged false representations or omitted facts were, and Instruction No. 31 on breach of contract likewise provided no hint of who were the asserted parties to the alleged contract, where or when it was made, or what were its terms. *See Tyler v. Dowell, Inc.*, 274 F.2d 890, 897 (10th Cir. 1960) ("[I]nescapable duty to fully and correctly instruct the jury . . . is not fulfilled by mere abstract statements or legal definitions, but rather by a fair and impartial statement of the factual issues and the law applicable thereto."); *Turlington v. Phillips Petroleum Co.*, 795 F.2d 434, 443 (5th Cir. 1996) ("The courts have shown a distinct preference, particularly in complex cases, for instructions that relate the law to the evidence." (internal quotations omitted)).

UIH named Ng as the only personal defendant and placed him at center stage. In fact, Woo is nowhere mentioned in the Complaint.

Finally, even focusing on Woo's actions, it is impossible to reconcile the absolution of Wharf Communications with the finding against Wharf Holdings. An especially convincing example is the chart UIH used in its opening statement to show Woo as chairman of both Wharf Holdings and *Wharf Communications*. TX 1607; Tr. 213. Another good example is TX 484, which UIH attaches to its Opposition as the centerpiece of its attack on Woo. Even assuming Woo's handwritten comments to Ng had the malevolent intent attributed to them by UIH, they led to a policy memorandum that was issued by *Wharf Communications*, not *Wharf Holdings*. *See* TX 481; TX 485. In fact, the vast bulk of UIH's evidence related to Wharf Communications, Wharf Cable and Stephen Ng, not Wharf Holdings. It is too late for UIH now to reverse its field and claim that the jury could rationally have imposed exemplary damages on the latter, while excusing the former.

B. The Inconsistencies In The Jury's Fraud, Breach Of Contract And Breach Of Fiduciary Duty Findings.

Wharf's Post-Trial Motion emphasizes (p.5) that, "The jury could not consistently find deceit based on defendants' promising to give UIH 10% of the company with no real intention of doing so, and at the same time find that defendants had in fact contracted to give UIH that same 10% share of the company." This is true whether the "contract" arose out of the alleged option or joint venture agreement.

The reason is simple. Once the jury found that an enforceable contract was entered into, there could no longer be any injury from the alleged fraud. Even assuming defendants had an earlier intent not to enter into a contract, they ultimately did so and plaintiffs received the full benefit of the contract that

was represented. This is particularly true in a case, like this, where the Court has expressly ruled that only "a single injury" flowed from the defendants' actions. 5/15/97 Order on Objs. to Prop. Form of Judg. at 1.

UIH tries to circumvent this straight-forward logic by arguing that, "If a defendant enters into a contract with a secret intent not to perform or to perform only if certain secret conditions are later fulfilled, he commits fraud; when he breaches the contract, he *also* commits a breach of contract. Opp. 19 (emphasis in original). UIH again ignores that the gravamen of its injury was always that Wharf backed out of a "promise" to give UIH an option, and both the contract and fraud claims were based on that same alleged promise or representation. Once the jury found a contract existed, the contract claim trumps the fraud claim, and rightly so where there is only a single injury alleged.

This same logic refutes UIH's claim that a different result should follow, because "the evidence showed that defendants engaged in a pattern of fraud that was much broader than the October 1992 grant to UIH of an option. . ." Opp. 19. No matter how much UIH tries to conjure up additional grounds for recovery, its case boils down to a single injury for which it can receive only one compensatory award.

UIH is mistaken that *Brody v. Bock*, 897 P.2d 769 (Colo. 1995), supports a different result. There, the defendant sought to bar plaintiffs' fraud claim because it was premised on the same facts as plaintiffs' alleged oral contract, which the court found was barred by Colorado's succession statute. *Id.* at 773-76. Unlike the situation here, the issue in *Brody* was what happens when plaintiffs had no contract claim. The reasoning underlying the decision to let plaintiffs' fraud claim proceed was that the succession statute should not be used as an "instrument of fraud" barring both the alleged oral contract and the fraud. *Id.* at 775. Here, of course, the alleged oral contract

was not barred; in fact, the jury found in UIH's favor on that claim.

The case that is actually on point is *Wolff v. Allstate Life Ins. Co.*, 985 F.2d 1524 (11th Cir. 1993). In that case, the jury returned a verdict in favor of plaintiff on both her breach of contract and fraudulent suppression claims. *Id.* at 1532-33. The Eleventh Circuit noted that, while a party may plead and present alternative causes of action to the jury, the jury may not return a factually inconsistent verdict. *Id.* at 1533. The court held that the jury's verdict was inconsistent because it found the contract in existence and breached while, on the other hand, finding there was no contract and defendant had concealed this fact. *Id.* at 1533-34. Thus, just as here, the verdicts were irreconcilably inconsistent and defendant was entitled to a new trial.[11]

Just as the jury could not consistently find both fraud and contract in the circumstances of this "single injury" case, it could not consistently find both a joint venture and an option agreement. To illustrate, a joint venture like any other contract requires consideration. *Fulenwider v. The Writer Corp.*, 544 P.2d 408, 410 (Colo. Ct. Ap. 1975). Here, both the alleged joint venture and option agreements rested on the same consideration – UIH's supposed undertaking to "commit its troops" to the project. Accordingly, one of the "contracts"

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[11] The jury's verdicts were not only inconsistent regarding the fraud and contract claims, but also regarding the intentional and negligent misrepresentation claims. The jury was told in Instruction No. 27 on negligent misrepresentations that the proof need only be that "the defendant was negligent in obtaining or communicating the information." Wharf's Post-Trial Motion correctly observes (p. 5) that, "It is impossible for a person to be guilty of deceit based on fraud based on a negligent misstatement." UIH's suggestion that the jury could find both a negligent and an intentional misrepresentation on the same facts (Opp. 19), would mean that every deceit case would automatically entail a negligent misrepresentation. Not surprising, UIH cites no authority for such a novel conclusion.

obviously lacked consideration. Like the other inconsistencies in the jury's verdicts, a new trial is required because the Court is not in a position to select one result over the other without running afoul of the Seventh Amendment.

C. The Jury's Inconsistent Tort And Contract Findings Conflict With The "Economic Loss Rule."

The economic loss rule prohibits UIH from bringing tort claims to recover for purely economic loss resulting from a breach of contract. *Jardel Enter., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301, 1303-04 (Colo. Ct. App. 1998) ("As a general rule, no cause of action lies in tort when purely economic damage is caused by negligent breach of a contractual duty."); *Hoseline, Inc. v. U.S.A. Diversified Prod., Inc.*, 40 F.3d 1198, 1200 (11th Cir. 1994) (reversing judgments on fraud and civil theft "because the economic loss doctrine bars tort recovery for contract claims which involve no injury to person or property"); *Bankers Risk Management Serv., Inc.*, No. 96-01895, 1997 WL 253033, at * 2-3 (Fla. Ct. App. May 16, 1997) (holding plaintiffs' fraud count "is so intertwined with the performance of the contract that the assertions do not rise to the level of an independent tort. The economic loss rule therefore bars recovery as to this count.").

This Court explained in *Richard O'Brien Co. v. Challenge-Cook Bros., Inc.*, 672 F. Supp. 466 (D. Colo. 1987), that the economic loss rule protects important and significant bargained-for rights. The rule

> operates so as to clarify, and protect effectively the principal concern and function of the law of contract – the protection of the legitimately bargained expectations of the parties. The imposition of tortious remedies upon that well established body of law can produce not only uncertainty, not only economic disarray

> but also a radical undercurrent which threatens to subvert the very concept of predetermined risk allocation. *Id.* at 471.

Other courts have similarly recognized the problems that are created when parties are allowed to circumvent traditional limits on contract remedies. *See, e.g., Iron Mt. Sec. Storage Corp. v. American Specialty Foods, Inc.*, 457 F. Supp. 1158, 1165-66 (E.D. Pa. 1978) ("These and other differences have characterized tort an contract as distinct forms of action, and the fact that tort rules usually provide greater advantages for plaintiffs' recoveries has led to 'more or less inevitable efforts of lawyers to turn every breach of contract into a tort'.") (quoting W. Prosser, Handbook of the Law of Torts § 92 (4th ed. 1971)).

Here, as previously emphasized, UIH's fraud theory is nothing more than a recasting of the same facts that make up its claim for breach of contract. To permit UIH to recovery exemplary damages under its fraud claim would undermine the purposes and protections of the economic loss rule. Indeed, this case presents a classic illustration of the untoward result that Professor Prosser warned against over twenty years ago. A case that turns on nothing more than an alleged breach of contract has been allowed to masquerade as a claim for fraud.[12]

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[12] The impermissible nature of UIH's Colorado common law fraud claim reinforces the inappropriateness of its federal 10b-5 claim, especially in light of the Supreme Court's holdings that 10b-5 is not intended to provide a broad remedy for all instances of alleged fraud. *See e.g., Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 190-91 (1994); *Basic Inc. v. Levinson*, 485 U.S. 224, 230 (1988); *Santa Fe Indus., Inc. v. Green*, 430 U.S. 462, 478-79 (1977).

V. THE OTHER GROUNDS IN WHARF'S POST-TRIAL MOTION ALSO SUPPORT JUDGMENT FOR DEFENDANTS, A NEW TRIAL OR A SUBSTANTIAL REMITTITUR

As previously stated, this Reply Memorandum will not elaborate on the other bases stated in the Post-Trial Motion for setting aside the Judgment. This is not because defendants believe those grounds are any less meritorious. On the contrary, to take one prominent illustration, defendants are as convinced today, as when they first raised the point, that this Court should dismiss the case for lack of subject matter jurisdiction. There was, and remains, no valid basis for plaintiffs' only federal question claims under the Securities Exchange Act of 1934. *See* Mot. 11-13, 15-16. This Court has rejected defendants' position each time it has been asserted, however, and there seems no need to reargue the issue again here.[13]

Because this is also true of the other points in the Post-Trial Motion that have not been covered in this Reply, what follows is confined to a brief response to arguments in UIH's Opposition where a failure to do so might be viewed as a waiver. Thus, defendants agree that their objections to the

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[13] Defendants do point out, however, that their argument that the parties intended Hong Kong law to apply is hardly "frivolous." *Compare* Opp. 22 *with* TX 470; TX 472; TX 524; TX 658; TX 707; TX 777; TX 1135; Tr. 1237-38; Tr. 1240; Tr. 2393; Tr. 2395-96. UIH has cited no evidence that some other law was to apply, and it opposed Wharf's request for a jury finding on the issue.

There is also nothing "frivolous" in Wharf's contention that, once UIH's federal claims are dismissed, its state claims should be dismissed as well. *Compare* Opp. 22 *with Ball v. Renner*, 54 F.3d 664, 669 (10th Cir. 1995) (dismissing state claims because "the most common response to a pretrial disposition of Federal claims has been to dismiss the state law claim or claims without prejudice"); *Thatcher v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990) (same; "[n]otions of comity and federalism demand that a state court try its own lawsuits, absent compelling reasons to the contrary").

Court's instructions have already been adequately argued. *Compare* Mot. 3-4, 8, 16-17 *with* Opp. 23-24. However, defendants do not agree that, "because the jury found for UIH on so many different legal theories, defendants' renewed protests . . . are essentially moot," and the errors "harmless." Opp. 23.

For example, UIH's suggestion that errors in the breach of contract instructions can be overlooked because of the jury's findings on other claims ignores that, absent a valid contract to purchase a security, all of UIH's securities claims collapse, along with the basis for federal jurisdiction. UIH is also wrong that there was no error in the Court's failure to instruct on mitigation because, "Defendants presented no evidence of a failure to mitigate." *Compare* Mot. 8 *with* Opp. 21. Defendants tried without success to introduce evidence through both Carey and Jones that UIH's damage claims should have been reduced by the amount that it would have earned — or did in fact earn — on the funds it never put in the Wharf project. *See e.g.*, Tr. 6290; Tr. 7004.[14]

While defendants also agree that it is unnecessary to reargue the Court's evidentiary rulings that are cited in their Motion, they again take issue with UIH's suggestion that these errors were harmless or not preserved. *Compare* Mot. 8-9, 14-15, *with* Opp. 20-21, 23-24. UIH can hardly maintain, for example, that it was harmless to let its witnesses repeatedly speculate that UIH would never have "committed its troops" if it had only known of Wharf's conditions on any investment, with the prominence that UIH counsel gave to this testimony

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[14] UIH is likewise wrong in claiming that defendants did not object to plaintiffs' proposed exemplary damages instruction. Opp. 11-12. Wharf objected to that instruction in its 12/30/96 Memorandum Of Law In Support Of Defendants' Proposed Jury Instructions And Verdict Forms (pp. 13, 26), and this Court made it clear after the instructions conference that such objections did not need to be renewed in order to be preserved. Tr. 7814-17.

during his closing. Likewise, UIH is wrong when it claims that Wharf failed to object when UIH was allowed to introduce and make misleading arguments from data regarding the asserted value of the cable project after the 1994 damages cut-off, whereas Wharf was precluded from showing the project's actual performance in subsequent years. *Compare* Mot. 8-9 *with* Opp. 20-22; *see* e.g., Tr. 5042-44; Tr. 8126.

Finally, there is no merit to UIH's argument that Wharf's challenge to the exemplary damages award "has nothing to do with UIH's right to recover attorneys' fees under the Colorado Securities Act." Opp. 22. Wharf's Post-Trial Motion rightly maintains that, "Plaintiffs should not be permitted to recover exemplary damages under their claims for deceit based on fraud and breach of fiduciary duty, which do not allow recovery of attorneys' fees, and then recover attorneys' fees under the Colorado securities laws, which do not permit exemplary damages." Mot. 10. This is particularly true when the attorneys' fees "unreasonably add to the already excessive damages awarded by the jury." *Id.*

CONCLUSION

For all of the reasons stated in this Reply, in Wharf's Post-Trial Motion, and during previous oral and written arguments, defendants respectfully request that the Court grant their Post-Trial Motion.

Dated: July 25, 1997

Respectfully submitted,

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APPENDIX L

BRIEF FOR DEFENDANTS-APPELLANTS, DATED APRIL 2, 1998, IN NO. 97-1421 (FILED IN THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT)

No. 97-1421

IN THE

United States Court Of Appeals

FOR THE TENTH CIRCUIT

UNITED INTERNATIONAL HOLDINGS, INC., a Delaware corporation; and UIH ASIA INVESTMENT CO., a Colorado general partnership,

Plaintiffs–Appellees,

v.

THE WHARF (HOLDINGS) LIMITED, a Hong Kong company; WHARF COMMUNICATIONS INVESTMENTS LIMITED, a Hong Kong company; WHARF CABLE LIMITED, a Hong Kong company; and STEPHEN NG, a Hong Kong citizen,

Defendants–Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

BRIEF FOR APPELLANTS

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April 2, 1998

STATEMENT REGARDING ORAL ARGUMENT

Counsel requests oral argument.

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PRIOR OR RELATED APPEALS

On December 31, 1997, Defendants-Appellants filed a Notice of Appeal from the district court's orders of December 4, 17 and 23 imposing contempt sanctions based on Defendants-Appellants' failure to comply with an order of the district court requiring Defendants-Appellants to collect certain assets in Hong Kong, transfer them to the United States and deposit them with the Clerk of the District Court for the District of Colorado. (Dkt. No. 98-1002)

This Court decided a prior appeal involving the parties, now cited as *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 76 F.3d 393 (10th Cir. 1996) (Table) (unpublished disposition).

APPELLANTS' 10TH CIR. R. 28.2(b) AND (c) STATEMENT[1]

Pursuant to Tenth Circuit Rule 28.2(b) and (c), Appellants set forth the following statement relating to their raising and the district court's disposition of the issues raised on appeal.

1. **Whether the district court lacked subject matter jurisdiction because of UIH's failure to allege or prove a violation of Section 10(b) of the Securities Exchange Act of 1934 or Rule 10b-5?;**

2. **Whether disputes about a party's rights to buy stock or alleged misrepresentations of a party's intentions to sell stock constitute violations of Rule 10b-5?; and**

3. **Whether a party which does not have an enforceable right to purchase stock has a claim actionable under Rule 10b-5?**

Wharf asserted that disputes over a plaintiff's alleged right to purchase stock are not federal securities law violations and that UIH failed to prove a misrepresentation "in connection with the purchase or sale of [a] security" in its motions to dismiss UIH's claims for lack of federal subject matter jurisdiction. (Aplt. App. at 40-48, 119-123) The district court denied Wharf's motion to dismiss on April 18, 1995. (Aplt. App. at 127) These issues were again raised in Wharf's third motion for summary judgment on UIH's securities law claims (Aplt. App. 206-225, 790-96), which the district court denied on November 25, 1996. *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 946 F. Supp. 861, 871-72 (D. Colo. 1996). In its motion for judgment as a matter of law at the close of the evidence, Wharf repeated its argument that there was no "purchase or sale" (Aplt. App. at 10030-31), but that motion was also denied. (Aplt. App. at 10033) Finally, Appellants re-

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[1] Citations to Appellants' Appendix are denoted "Aplt. App. at __"; citations to Appellants' Addendum of Trial Exhibits are denoted "Add. at __".

asserted their 10(b) argument in their post-trial motion (Aplt. App. at 1606-08), which was denied in an oral ruling on October 23, 1997. (Aplt. App. at 2056-61)

4. **Whether the applicability of Hong Kong law instead of federal law deprived the district court of subject matter jurisdiction?**

Wharf initially argued that the relationship between Wharf and UIH was governed by Hong Kong law in its Motion to Dismiss Based Upon Forum Non Conveniens (Aplt. App. at 108-112), which the district court denied on April 18, 1995. (Aplt. App. at 127) Wharf raised the issue again in its summary judgment motions (Aplt. App. at 183-185, 198-201, 770-75), which were also denied by the district court. *United Int'l*, 946 F. Supp. at 856-66, 871. Wharf also raised this choice of law issue at trial (Aplt. App. at 1513, 1542, 1544), but the court refused to instruct the jury on the question whether Hong Kong law applied. (Aplt. App. at 10033-36, 10043, 10053) Wharf's assertion that Hong Kong law governed in its post-trial motion (Aplt. App. at 1606) was similarly rejected by the trial court. (Aplt. App. at 2056-61)

5. **Whether this Court should vacate the judgment below as to all of the causes of action because of the district court's lack of subject matter jurisdiction?**

From the outset, Wharf argued that the district court should dismiss the entire case for lack of subject matter jurisdiction (Aplt. App. at 36-54, 118-26), but the argument was rejected. (Aplt. App. 128-29) Wharf renewed its jurisdictional challenge on summary judgment (Aplt. App. at 184-85, 206-22) to no avail. *United Int'l*, 946 F. Supp. at 866-867, 871-72. Wharf's post-trial challenge to the district court's subject matter jurisdiction (Aplt. App. 1606-08) was similarly unavailing. (Aplt. App. at 2056-61)

6. Whether UIH's "oral option" claims are barred by the statue of frauds?

Wharf argued that UIH's oral contract claims were barred by the statute of frauds in its motion to dismiss. (Aplt. App. at 41-42, 120-22) However, the trial court did not agree. (Aplt. App. at 127-29) Wharf repeatedly argued that the jury should be instructed on the statute of frauds. (Aplt. App. at 1523, 1298-1309, 1312-18, 1325-30, 1331-34, 1336-40) The district court refused to give such an instruction (Aplt. App. at 1549-52), and Wharf's post-trial motion which reasserted that position (Aplt. App. at 1611) was denied. (Aplt. App. at 2056-61)

7. Whether UIH's tort claims are barred by the Economic Loss Rule?

Wharf's summary judgment briefs argued that the Economic Loss Rule holds that where purely economic losses are at issue, tort remedies are limited. (Aplt. App. at 232) Wharf pointed out that UIH's complaint was nothing more than a claim for simple breach of an alleged oral contract (Aplt. App. at 243), and objected to UIH's improper attempt "to transform its breach of contract claim into a fraud claim". (Aplt. App. at 796-97) The district court denied Wharf's summary judgment motion on the ground that a tort claim for misrepresentation can be predicated on statements of future as well as existing facts. *United Int'l*, 946 F. Supp. at 870. During jury instruction conferences before trial, Wharf unsuccessfully argued that the Economic Loss Rule barred UIH's claims for misrepresentation, because they were merely a recasting of UIH's breach of contract claim. (Aplt. App. at 1289, 1293-94) Wharf again argued the application of the Economic Loss Rule in its post-trial motion (Aplt. App. at 1647-48), which the trial court denied on October 23, 1997. (Aplt. App. at 2056-61)

8. **Whether UIH failed to introduce legally sufficient evidence to prove that the parties intended to be bound by an oral agreement?**

Wharf argued this point in its summary judgment motion filed after the close of discovery. (Aplt. App. at 241-44, 253-58) Defendants' motion was denied. *United Int'l*, 946 F. Supp. at 867-869. Wharf renewed its argument regarding the legal insufficiency of the evidence to support UIH's claims in its motion for judgment as a matter of law at the close of the evidence, which was denied. (Aplt. App. 10023-33) Wharf's post-trial motion asserting these same points (Aplt. App. at 1607) was also denied. (Aplt. App. at 2056-61)

9. **Whether UIH failed to prove the damages it sustained as the result of deprivation of its alleged oral option and misrepresented its compensatory damage evidence to the jury?**

Wharf argued that UIH introduced no evidence regarding the value of its alleged option, but only of the value of a 10% stockholding in the cable system throughout the trial. During the direct examination of Robert Jones, plaintiffs' principal damages expert, UIH counsel asked him to "teach us generally how you value a cable television system". (Aplt. App. at 8232) Jones later testified on direct: "So we have a combination of things we're looking at as far as the value of the company." (Aplt. App. at 8275) On cross-examination, Wharf counsel made clear that Jones had not valued the claimed option, but rather what he did "was to value a 10% ownership interest in the cable company . . . ." (Aplt. App. at 8447) Wharf's motion for judgment as a matter of law on the grounds that there was no legally sufficient evidence to support UIH's claims was denied by the district court. (Aplt. App. at 10023-33)

In closing, Wharf's counsel returned to this lack of proof issue once again, telling the jury that he would "talk about UIH's expert, Mr. Jones, and the huge mistakes that he made that we know about and how that affects the entire damage analysis in the case". (Aplt. App. at 10253) The first question

framed by Wharf's counsel was "what, if any, dollar value is there to the alleged option in this case?" (Aplt. App. 10254) Wharf's counsel argued "[t]here is not any plaintiff witness, at all, who actually valued the option that's claimed in this case in the amended complaint in Paragraph 54" and that "neither Mr. Jones nor Mr. Bowles nor anyone else from UIH valued this option as an option, at all". (Aplt. App. 10255, 10272) However, the jury apparently found otherwise. (Aplt. App. at 1592-95)

Wharf raised the issue of failure of proof on UIH's compensatory damages once again in its post-trial motion. (Aplt. App. at 1602-04, 1629-36) Wharf's motion was denied. (Aplt. App. at 2056-61)

10. **Whether the jury award of compensatory damages should be vacated because it is grossly excessive, speculative and vitiated by the court's exclusion of evidence of Wharf Cable's actual performance and the court's failure to instruct the jury on mitigation of damages?**

At trial, Wharf attempted to introduce evidence demonstrating that Wharf Cable's financial performance had failed to meet the projections upon which UIH's damages estimates were based, but the district court sustained plaintiffs' objection to such testimony. (Aplt. App. at 7218-22) Wharf subsequently submitted an offer of proof to the court as to Wharf Cable's actual performance. (Aplt. App. at 1546-48) Wharf asserted in its post-trial motion that the exclusion of this evidence was error, and that the jury's compensatory damages award was excessive and impermissibly speculative (Aplt. App. at 1602-04, 1633-36), but the motion was denied. (Aplt. App. at 2056-61) Despite Wharf's repeated requests that the court instruct the jury on the principles of mitigation of damages (Aplt. App. at 1510-12, 1540, 1283-85, 1320-22), the court failed to instruct the jury on mitigation.

11. Whether the jury's punitive damage award should be vacated or reduced because UIH failed to introduce evidence legally sufficient to prove its entitlement beyond a reasonable doubt, because the award failed to comply with state and federal law and because it is excessive?

In their motion for judgment as a matter of law at the close of evidence, defendants argued that UIH had introduced "no legally sufficient evidence that the defendants acted knowingly with an intent to deceive, manipulate or defraud the plaintiffs", and that "[a]t best, what's been proved is . . . a misunderstanding". (Aplt. App. at 10029-31) That motion was denied. (Aplt. App. at 10033) After trial, the defendants argued that the evidence was legally insufficient to meet the standard of proof necessary to support an award of exemplary damages, and objected to the jury's exemplary award as excessive, particularly in light of applicable Colorado statutes regarding exemplary damages awards. (Aplt. App. at 1597-1601, 1617-28) However, defendants' objections to the jury's exemplary damages award were rejected by the trial court. (Aplt. App. at 2056-61)

12. Whether the district court's award of $28,208,440 in prejudgment interest should be vacated?

Defendants argued in their post-trial motion that prejudgment interest was not permitted in this case (Aplt. App. at 1604-06, 1636-40), but the district court disagreed. (Aplt. App. at 2056-61)

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

The district court did not have subject matter jurisdiction over this case. UIH's assertion of federal question jurisdiction was based solely on their allegation of defendants' violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b), and S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5. Section 10(b) and Rule 10b-5 do not apply to disputes about a party's alleged right to purchase stock or another's alleged misrepresentations of its intention to sell stock. *See Gurwara v. LyphoMed, Inc.*, 937 F.2d 380, 382-83 (7th Cir. 1991); *Hunt v. Robinson*, 852 F.2d 786, 787 (4th Cir. 1988); *Tully v. Mott Supermarkets, Inc.*, 540 F.2d 187, 194 (3d Cir. 1976). Without jurisdiction, the district court should have dismissed UIH's state claims.

For purposes of appellate review, this Court's jurisdiction is based on 28 U.S.C. § 1291 because the orders appealed from, i.e., (1) the Judgment on Jury Verdicts entered on May 23, 1997, and (2) the Order of October 23, 1997, denying Wharf's post-trial motions, are final orders. Defendants-Appellants timely filed their Notice of Appeal on November 4, 1997, within 30 days of the district court's denial of their post-trial motions on October 23, 1997.

STATEMENT OF THE ISSUES

1. Whether the district court lacked subject matter jurisdiction because of UIH's failure to allege or prove a violation of Section 10(b) of the Exchange Act of 1934?

2. Whether disputes about a party's rights to buy stock or alleged misrepresentations of a party's intentions to sell stock constitute violations of Rule 10b-5?

3. Whether a party which has no enforceable right to purchase stock has a claim actionable under Rule 10b-5?

4. Whether the applicability of Hong Kong law instead of federal law deprived the district court of subject matter jurisdiction?

5. Whether this Court should vacate the judgment below because the lower court lacked subject matter jurisdiction?

6. Whether UIH's "oral option" claim is barred by the statute of frauds?

7. Whether UIH's tort claims are barred by the Economic Loss Rule?

8. Whether UIH failed to prove that the parties intended to be bound by an oral agreement?

9. Whether UIH failed to prove the damages it sustained and misrepresented its damages evidence to the jury?

10. Whether the jury award of compensatory damages should be vacated because it is grossly excessive and speculative, and because the district court erroneously excluded evidence of the cable TV system's actual performance and failed to instruct the jury on mitigation of damages?

11. Whether the jury's punitive damage award should be vacated or reduced because UIH failed to introduce evidence legally sufficient to prove its entitlement beyond a reasonable doubt, because the award failed to comply with state and federal law, and because the award was excessive?

12. Whether the district court's award of $28,208,440 in prejudgment interest should be vacated?

Questions (1)-(7) are questions of law as to which the standard of review is de novo. *Uselton v. Commercial Lovelace Motor Freight, Inc.*, 940 F.2d 564, 572 (10th Cir. 1991); *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992); *Mitchell v. State Farm Fire & Cas. Co.*, 902 F.2d 790, 792 (10th Cir. 1990). Resolution of question (4) may involve subsidiary questions of fact decided by the district court which are reviewed for clear error. *Mitchell*, 902 F.2d at 792. Questions (8)-(11) involve the legal sufficiency of the evidence. The Court must determine whether the record contains substantial evidence to support the jury's

decision. *Thunder Basin Coal Co. v. Southwestern Pub. Serv. Co.*, 104 F.3d 1205, 1212 (10th Cir. 1997). Question (10) also includes questions involving the district court's abuse of discretion relating to the excessiveness of the jury verdict and the district court's exclusion of evidence and a question of law relating to the district court's failure to give a mitigation instruction. *United States v. Oberle*, No. 96-2775, 1998 WL 78015, at *2 (10th Cir. Feb. 25, 1998). Question (11) also involves questions of law relating to the district court's failure to apply the Colorado statutes limiting punitive damage awards. Question (12) is a question of law which is reviewed de novo.

STATEMENT OF THE CASE

This case arises out of the award to Defendant-Appellant The Wharf (Holdings) Limited ("Wharf") of a franchise to operate a cable TV system in Hong Kong. The dispute between Wharf and United International Holdings, Inc. ("UIH") arose from the parties' negotiations relating to a possible investment by UIH in the cable TV system. Because this system required an investment in excess of $500,000,000, the parties' negotiations involved numerous complex issues which were addressed in draft letters of intent and a 50-page draft shareholders' agreement. Wharf and UIH did not complete or sign the draft letter of intent or the draft shareholders' agreement because they never reached an agreement. The sole claim of Plaintiffs-Appellees UIH and UIH Asia Investment Co. is that Wharf breached obligations arising out of an alleged oral agreement granting UIH an option to purchase 10% of the stock of the cable TV system for a price in excess of $50,000,000.

Wharf did not agree to grant UIH an option to purchase stock, orally or in writing. UIH's oral option claim rests on the testimony of two of UIH's principal officers concerning a single conversation. UIH's oral option claim is contradicted by the documentary record of the parties' negotiations before and after the alleged oral agreement which proved that the parties contemplated signing a nonbinding letter of intent, to be

followed by a binding shareholders' agreement. Neither of those documents was ever executed because Wharf, NYNEX and UIH never reached an agreement.

UIH asserted claims for breach of contract, breach of fiduciary duty, negligent misrepresentation, fraud and violations of federal and state securities laws—all based on UIH's alleged oral option. The jury found for UIH on all counts, awarding $67,000,000 in compensatory damages on all counts, except for negligent misrepresentation as to which the jury awarded $8,100,000. The jury also awarded UIH $58,500,000 in punitive damages on the fraud and breach of fiduciary duty claims. The total of $125,500,000—an amount advertised by UIH to be the largest jury award in Colorado history—contrasted with UIH's total outlay of approximately $900,000 on the project. The district court entered its Judgment on May 23, 1997, adding $28,208,440 in prejudgment interest and awarding UIH attorneys' fees and costs to be determined in a separate proceeding. The court denied Wharf's post-trial motions on October 23, 1997 and defendants filed their Notice of Appeal on November 4, 1997.

STATEMENT OF FACTS

Wharf is a long established Hong Kong company, with significant holdings in transportation, communications and real estate. (Aplt. App. at 1916-2010, 1913-14) Through its subsidiaries, Wharf Communications Investments Limited ("WCIL") and Wharf Cable Limited ("Wharf Cable"),[2] Wharf operates the Hong Kong cable TV system. (Aplt. App. at 1919, 6970-71) Defendant Stephen Ng is an officer of WCIL. (Aplt. App. at 1966, 6970) Cable Network Communications Limited ("CNCL") is the entity whose stock would have been sold to UIH if the parties had reached agreement.

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[2] Wharf Cable was originally a defendant, but is not an appellant because all claims against it have been withdrawn or dismissed.

UIH is a Denver-based corporation engaged in the business of cable TV services and investments. (Aplt. App. at 72, 2608) UIH Asia Investment Co. ("UIH Asia") is a partnership between UIH and two Hong Kong corporations which had its principal place of business in Hong Kong. (Aplt. App. at 72, 55)

1. *Wharf explores plans to develop a cable TV and telecommunications facility in Hong Kong.*

In 1991, Wharf began to explore the possibility of building and operating a cable TV and telecommunications system in Hong Kong. (Aplt. App. at 7022-23, 7027-28) The TV system was to be the first step toward using the transmission lines to provide telephone and computer services as well. (Add. at 4-6) The proposed project was a major undertaking, with the total shareholder capital required for the cable TV project expected to be in excess of $500,000,000. (Add. at 20)

Because of the importance of the telecommunications aspect of the project, Wharf initiated discussions in the Spring of 1991 with NYNEX about forming a venture. (Add. at 1; Aplt. App. at 2887-89) Thereafter, UIH approached Wharf in Hong Kong during 1991 to explore an "opportunity for us to work together". (Add. at 24; Aplt. App. at 4029-33) During these discussions, UIH twice proposed that Wharf grant UIH an option to purchase stock in the proposed cable TV company. Wharf rejected these overtures. (Add. at 24, 30-31, 33; Aplt. App. at 3361-62, 3376, 4037-38, 4176, 4389-90) One of Wharf's major concerns was obtaining assurance of other potential investors' commitment and ability to fund their investments. (Aplt. App. at 5930)

2. *Wharf, NYNEX and UIH negotiate about draft letters of intent and shareholders' agreements from August to November 1992.*

In May 1992, Wharf learned that the Hong Kong government would seek formal bids for the TV franchise in September 1992. During June 1992, Wharf met with NYNEX and UIH to discuss the project. (Add. at 39-41; Aplt. App. at

2941-42, 5491) Wharf, NYNEX and UIH were careful to define the point at which negotiations would mature into legally binding obligations. The parties understood that those legal obligations arose only after they had agreed on the many issues involved in such a venture, their boards of directors had approved the venture, and their complex agreement was set forth in a written shareholders' agreement which was duly executed by the parties. NYNEX officers testified that they understood that the agreement relating to the system must be in writing, approved by the parties' boards of directors and executed by the parties. (Aplt. App. at 2944-47, 2952-54)

UIH clearly understood that any legal obligation would be conditioned on approval by the parties' boards of directors and execution of a formal written agreement. In a memo at the outset of the negotiations dated June 4, 1992, Mark Schneider, UIH's president, wrote that, "*there will be ways out of the deal depending on approval, etc.*" (Add. at 34) (emphasis added) Mr. Schneider's June 4, 1992 memo anticipated "a term sheet to be drafted next week". (*Id.*) That term sheet, prepared on June 11, 1992, by UIH's chief negotiator, Mr. Michael Fries, set forth the following "*Conditions Precedent*":

> Approval of financial and operating plan.
> *Board consent.*
> Receipt of CATV licence.
> Government/regulatory approvals.
> *Final documentation.* (Add. at 37; *see* Aplt. App. at 4402-03, 6513-24) (emphasis added)

On August 24, 1992, UIH's Hong Kong counsel, Ms. Sonjia Norman, wrote to one of Wharf's negotiators, Mr. Emil Fung, commenting on the initial draft of a letter of intent. (Add. at 48-51; Aplt. App. at 4419-25, 6582-84) That memorandum stated:

> *Our signing of the full Shareholder's Agreement* after this letter of intent should be *conditional upon*:
>
> a) our approval of the financial, operating and programming plans;

b) *board consent on both sides*;

c) award of the local franchise;

d) the subscription by NYNEX of 20% of Wharf Cable. (Add. at 48) (emphasis added)

These documents prove that UIH understood that board consent was required and that the parties' legal obligations must be set forth in a definitive written agreement that was signed by all the parties. Wharf and UIH never signed any of the draft letters of intent or draft shareholders' agreements prepared during 1992 or any of the draft memoranda of understanding prepared by UIH in 1993. Nor were the documents ever approved by the parties' boards of directors.

Counsel for Wharf drafted the first of a series of expressly nonbinding letters of intent in August 1992. The letter of intent was to be followed by a binding shareholders' agreement. The letter of intent expressly stated that:

> This letter *does not create legally binding and enforceable obligations* . . . . Each of the parties will negotiate in good faith, and use all reasonable endeavors to conclude the terms of a formal, *legally binding shareholders' agreement* between them . . . . (Add. at 43, 46-47) (emphasis added)

The draft letter also recognized that any agreement was "subject to each of them obtaining all requisite consents and authorities including, where necessary, approvals of shareholders and their boards of directors to the proposed investment . . . ." (Add. at 43)

All of the draft letters of intent provided that Wharf, NYNEX and UIH would acquire stock representing 70%, 20% and 10% of the TV project, respectively, and stated that the three parties "*will subscribe for shares* and make loans to Wharf Cable pro-rata to their ownership interests in accordance with upper limits as outlined in a capital contribution schedule which will be attached to the Shareholders' Agreement". (Add. at 44; *see* Add. at 55, 60, 123, 130, 137, 144) The draft letters

of intent made it plain that Wharf, NYNEX and UIH would each obligate itself to fund its share of the venture. (*See id.*) UIH's *obligation* to buy 10% of the stock of CNCL contemplated by the draft letters of intent is flatly inconsistent with UIH's later oral *option* claim.

Wharf, NYNEX and UIH discussed the draft letters of intent during August and September 1992, circulating at least five drafts. (Add. at 42, 52, 58, 120, 127, 134, 141) Throughout those revisions, the drafts provided that:

(1) the letters *did not create legally binding obligations*;

(2) the parties were to negotiate and execute *legally binding written shareholders' agreements*;

(3) the transaction was subject to *approval by their boards of directors*; and

(4) the letters of intent provided for *obligations* on the part of Wharf, NYNEX and UIH to purchase their respective shares of the stock of Wharf Cable.

Wharf, NYNEX and UIH also began negotiating the draft shareholders' agreement in September 1992. (Aplt. App. at 4217-18, 7961-62) That document, more than fifty pages in length, had complex provisions relating to the parties' ownership, their financing obligations, governance, sale of their interests, dividends and the like. (Add. at 205-57)

3. *Wharf, NYNEX and UIH fail to reach agreement as to the draft letters of intent or draft shareholders' agreements.*

Wharf, NYNEX and UIH were unable to finalize the letter of intent or shareholders' agreement by the September 30, 1992 deadline for submission of franchise bids to the Hong Kong government. (Aplt. App. at 2546-47, 2695-96, 4156-57, 5868-69, 7108-10) As a result, Wharf submitted the bid in its own name. The Wharf bid expressly stated that:

> If Wharf Cable is successful in its license application, Wharf will consider the introduction at the appropriate

> time of NYNEX, UIH and other strategic partners as co-investors to purchase up to 40% of the shares in CNCL. (Add. at 196)

In lieu of the shareholders' agreement that Wharf had hoped to submit with the bid, it entered into separate Technical Cooperation Agreements ("TCA") with NYNEX and UIH, which were executed in Hong Kong. (Add. at 163, 148, 195; Aplt. App. at 2956-62, 4371-73, 6659-60, 7116) The TCAs detailed the services that NYNEX and UIH would supply if Wharf was awarded the franchise. (Add. at 148, 163; Aplt. App. at 5898-5901) The TCA with UIH provided that:

> UIH shall have *no right or interest in the Company or in the CATV System*, nor any claim or lien with respect thereto, arising out of this Agreement or the performance of its services hereunder. (Add. at 156; Aplt. App. at 5898-5901) (emphasis added)

The TCA was also explicit that "additions to this Agreement as well as any additional or supplemental agreements to this Agreement must be made in writing. Additional oral agreements are invalid". (Add. at 160)

Wharf, NYNEX and UIH turned to negotiating the draft shareholders' agreement during October and November of 1992. (Add. at 311, 312-15; Aplt. App. at 6668-69, 8111-12) A memo by Mr. Michael Fries, chief negotiator for UIH, dated November 9, 1992, summarized his recent trip to Hong Kong and identified resulting action items. (Add. at 312) First on Mr. Fries' list of "Key issues" for negotiation was the issue of "ownership". (Add. at 315)

The draft shareholders' agreement went through four revisions in the Fall of 1992, which were dated September 16, October 26, November 4 and November 19, 1992. (Add. at 64, 205, 258, 340) All drafts between September 16 and November 19, 1992 involved *obligations* on the part of the

shareholders to finance the venture in proportion to their stock ownership. The last draft provided:

> Immediately following the signing of this Agreement the Shareholders shall deliver to the Company unconditional applications in writing addressed to the Company for the allotment to them at par of the following number of Shares respectively:-
>
> Wharf: [ ] Shares
> UIH: [ ] Shares
> NYNEX: [ ] Shares (Add. at 356)

All drafts imposed obligations on the shareholders to fund CNCL in proportion to their stock ownership. (Add. at 82-89, 220-26, 273-79, 355-61) All versions of the draft agreement rendered void any oral agreement relating to its subject matter. (Add. at 115, 252, 306, 388) The draft agreement was, therefore, inconsistent with UIH's claimed oral option, in all its versions—both before and after October 8, 1992—the date on which UIH's witnesses testified they had been granted an oral option. (Aplt. App. at 2468, 2696, 2781, 3462)

Toward the end of 1992, NYNEX notified Wharf that it had decided to defer any decision concerning investment in the project until after the TV service was launched. (Add. at 393, 394, 396; Aplt. App. at 7584) Mr. Ng promptly informed Mr. Schneider of the NYNEX decision, along with Wharf's decision to put off a decision on any investment by parties other than Wharf until service launch, in a telephone call in January 1993. (Add. at 394) Mr. Ng repeated that advice in a meeting in London with Mr. Schneider on January 24, 1993. (Add. at 395, 396; Aplt. App. at 7584) Mr. Ng confirmed that advice in a letter to Mr. Schneider dated February 27, 1993: "I mentioned to you in London that, given the NYNEX situation, we should put ownership issues on hold until after service launch." (Add. at 396) The franchise was awarded to Wharf on June 1, 1993, and Wharf launched TV service on October 31, 1993. (Aplt. App. at 2423, 3185, 8831)

UIH's claim in this case is based on the testimony of two of its officers, Mr. Mark Schneider and Mr. William Elsner, that Mr. Ng orally granted UIH an option to purchase 10% of the stock of CNCL during a conversation on October 8, 1992. That claim is flatly inconsistent with the documentary record of the parties' negotiations. That record conclusively proves that the parties structured their negotiations to proceed from a nonbinding letter of intent to a binding shareholders' agreement, not by oral grant of an option. The draft letters of intent also conditioned the parties' contractual obligations on approval of their boards of directors, which was never given. All drafts of the letters of intent and shareholders' agreements—before and after October 8, 1992—involved an obligation on the part of UIH to purchase stock and are thus inconsistent with an option.

4. *UIH attempts to reopen negotiations during 1993.*

As of April 30, 1993, Wharf and UIH had reached no agreement relating to UIH's ownership of CNCL. UIH knew that. The absence of any agreement prompted Mr. Fries to send a newly drafted Memorandum of Understanding ("MOU") relating to UIH's proposed investment to Mr. Emil Fung on April 30. (Add. at 398-406) Neither Mr. Fries' letter transmitting the MOU, nor the draft MOU made any reference to the alleged oral option agreement of October 8, 1992. (*Id.*) To the contrary, Mr. Fries' letter said: "We left the issue of UIH's ownership in Stephen's [Mr. Ng's] hands." (Add. at 398)

Unlike the 1992 draft letters of intent, Mr. Fries' draft MOU purported to be legally binding: "This Agreement is legally binding upon both parties and shall remain in effect for 180 days from the date hereof." (Add. at 406) Despite its ostensibly enforceable nature, UIH's acquisition of the shares in CNCL was still "conditioned upon . . . approval by both UIH and Wharf of . . . the Pay TV Business Plan", and "the Shareholders' Agreement". (Add. at 401)

Like the earlier draft letters of intent, Mr. Fries' draft MOU spoke in terms of an *obligation* on the part of UIH to acquire the shares. The draft MOU "records the principle (sic) terms and conditions pursuant to which the parties *will* cooperate together and invest in . . . . [CNCL]"; "UIH *shall* acquire up to 20% of the shares of CNCL from Wharf"; and "[o]n the Acquisition Date, UIH *will* make an initial capital contribution . . . ." (Add. at 400, 401) (emphasis added)

Mr. Fries' April 30 draft MOU lacked the clarity of the earlier draft letters of intent and shareholders' agreements. Although it purported to be a legally binding agreement, it made any obligation conditional on future approval by Wharf and UIH. (Add. at 406, 401) Although it spoke in terms of UIH's obligation to purchase shares, it also spoke of UIH's notifying Wharf of its "intent to acquire". (Add. at 401) Subsequent draft MOUs prepared by UIH in June and July of 1993 did apparently propose an option, but that concept was abandoned when UIH submitted its last MOU in November 1993 which obligated UIH to purchase stock in CNCL. (*Compare* Add. at 409, 418, *and* 430, *with* Add. at 623).

Although UIH persisted in its efforts through 1993, UIH never sent Wharf any communication claiming that Wharf had entered into an oral option agreement on October 8, 1992, or demanding its performance. To the contrary, UIH's communications admitted the absence of any obligation. On November 5, 1993, Mr. Schneider wrote to Mr. Ng, saying "UIH has an *expectation and desire* to invest not less than 10% in the Wharf Cable project". (Add. at 620) (emphasis added) That letter carried with it UIH's last draft MOU. (Add. at 620-29) As Mr. Schneider described the MOU: "The contract establishes the basic terms of UIH's investment and confirms our good faith negotiations *but would be subject to both of our board's approval.*" (Add. at 620) (emphasis added)

The November 5, 1993 draft MOU stated that "[o]n or before . . . the 'Acquisition Date' . . . UIH *will* acquire a [10%] ownership interest in CNCL" and that "[e]ach shareholder *shall* fund its pro rata share of Capital Contributions . . . ." (Add. at

623-24) (emphasis added) That is, this draft MOU, like the earlier draft letters of intent and draft shareholders' agreements, obligated UIH to purchase shares in CNCL. It did not create an option. (Aplt. App. at 6751-53) And even at that late stage, UIH's proposed MOU still required the approval of both boards of directors: "UIH's investment in CNCL is conditioned upon the approval of the board of UIH and WCIL." (Add. at 623)

The actual state of relations between Wharf and UIH as of November 1993 was accurately described by a UIH draft prospectus which Mr. Schneider sent to Mr. Ng on November 11, 1993:

> *The Company continues to pursue its opportunity* to acquire through UIH Asia a 10% interest in Wharf Cable Limited . . . . The Company is currently negotiating the acquisition of the 10% interest in Wharf Cable . . . . however, *there can be no assurance that the Company will acquire an interest in Wharf Cable.* (Add. at 631) (emphasis added)

UIH's oral option claim was based on the testimony of two of its officers that Mr. Ng had orally agreed to grant UIH an option to purchase stock in CNCL during a conversation on October 8, 1992. Mr. Ng. has consistently denied that any such conversations took place. As demonstrated below, UIH's claim is flatly inconsistent with the documentary record of the parties' negotiations, which conclusively proves that Wharf and UIH did not intend to be bound except by a written contract. These documents—from the first draft letter of intent to the last MOU drafted by UIH—also clearly prove that the parties understood that the approval of their boards of directors was required. It is undisputed that Wharf's board never approved and that the parties never agreed to or signed the draft letters of intent, MOUs or shareholders' agreements.

UIH's oral option claim is also inconsistent with the draft letters of intent and draft shareholders' agreements prepared during 1992 because all of them involved a stock purchase agreement, not an option agreement. Moreover, despite the fact

the draft shareholders' agreement was contemporaneous with the alleged oral option and expressly voided all other agreements "orally or in writing", UIH never attempted to modify its inconsistent provisions. Indeed, there is not a single communication sent by UIH to Wharf in which UIH asserted the existence of an October 8, 1992 oral option agreement or demanded its performance.

5. *UIH misrepresented its compensatory damages to the jury.*

UIH misrepresented its compensatory damages and misled the jury into awarding damages which are many times any injury UIH could have suffered. UIH claimed that it had been deprived of the value of an oral option to purchase 10% of the shares of CNCL upon payment of 10% of the shareholder capital of CNCL. In valuing an option, the exercise price must be deducted from the value of the stock purchased on exercise.

UIH's damage expert, Mr. Robert Jones, did not value UIH's alleged option. (Aplt. App. at 8446-48) He estimated the value of 10% of the stock of CNCL. (*Id.*) He determined that value to be $50 million as of October 1992 and $67 million as of March 1994. (Aplt. App. at 8287-94, 8301-04) In his closing, UIH counsel misrepresented Mr. Jones' study to be a valuation of UIH's option. (Aplt. App. at 10163-64) In awarding compensatory damages of $67,000,000, the jury adopted the higher of Mr. Jones' two valuations of the value of 10% of the stock of CNCL. (Aplt. App. at 1565, 1569, 1570, 1572, 1575, 1579, 1580, 1582, 1585, 1587)

Since the price which UIH had to pay for 10% of CNCL, although never proven by UIH, was variously guesstimated at $50,000,000 to $60,000,000, the jury's award of $67,000,000 vastly overstated the damages allegedly sustained by UIH. (Aplt. App. at 3460-61, 3615, 5046-47, 6744)

SUMMARY OF ARGUMENT

UIH's claims are based on its allegation that Wharf breached obligations arising from an alleged oral option to sell

Wharf 10% of the stock of the Hong Kong cable TV system in exchange for UIH's providing 10% of the shareholder capital of the system. The judgment below should be reversed and vacated because the district court lacked subject matter jurisdiction. The district court lacked subject matter jurisdiction because the federal securities laws do not apply to parties' disputes over their alleged rights to buy stock, because UIH did not have an enforceable contract to purchase stock and because Hong Kong law applied to this case.

The district court's liability judgment should be reversed because all of UIH's contract and tort claims, based on an alleged oral option agreement, are barred by the Colorado statute of frauds. All of UIH's tort claims are barred by Colorado's Economic Loss Rule which bars the assertion of tort claims based on breach of contract where the claims allege a misrepresentation of the defendant's intention to perform the contract. The district court's liability judgment should be reversed because the documentary record of the parties' negotiations conclusively proves that the parties intended to be bound only by a written, executed agreement and is inconsistent with UIH's oral option claim.

The jury's award of compensatory damages of $67,000,000 should be vacated because UIH failed to introduce legally sufficient evidence to prove the value of its oral option and successfully misrepresented its damages evidence which failed to deduct the price UIH would have to pay upon exercise of its option. The award of compensatory damages should be vacated because UIH's evidence of alleged lost profits from a nonexistent cable TV venture was speculative, because the trial court excluded evidence of the venture's actual performance, because the trial court refused to require mitigation and because damages of $67,000,000 based on UIH's outlay of $900,000 is grossly excessive.

The jury's award of punitive damages of $58,500,000 should be vacated because UIH failed to prove its entitlement beyond a reasonable doubt, because the award is inconsistent with Colorado law and constitutional law limiting the

imposition of punitive damages and because the award was grossly excessive.

The district court's award of prejudgment interest should be vacated because prejudgment interest is not applicable to future profit damages under Colorado law.

ARGUMENT

I. DISPUTES OVER A PLAINTIFF'S ALLEGED RIGHT TO PURCHASE STOCK ARE NOT FEDERAL SECURITIES LAW VIOLATIONS

This case should never have been brought in a federal court. It should have been dismissed on defendants' motion to dismiss at the beginning of the case. UIH asserted federal question jurisdiction based on an alleged violation of Section 10(b) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78j(b) (the "Exchange Act"), and S.E.C. Rule 10b-5, 17 C.F.R. § 240.10b-5. UIH's 10b-5 allegation was based on its claim that Wharf misrepresented its intention to sell UIH the stock of CNCL upon UIH's exercise of its alleged oral option.

Every court of appeals to have considered the question in recent years has ruled that Section 10(b) and Rule 10b-5 do not apply to disputes about parties' alleged rights to purchase stock. *See Gurwara*, 937 F.2d at 382-83; *Hunt*, 852 F.2d at 787; *Tully*, 540 F.2d at 194.

All of the modern authority ruling that Rule 10b-5 does not apply to parties' disputes over rights to purchase stock is rooted in the Supreme Court cases of *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 95 S. Ct. 1917 (1975) and *Santa Fe Industries v. Green*, 430 U.S. 462, 97 S. Ct. 1292 (1977). In *Blue Chip*, the Supreme Court held that Section 10(b) does not apply to a plaintiff's claim that it would have purchased stock but for some alleged statements by a defendant. In *Blue Chip*, the Supreme Court adhered to "the *Birnbaum* rule" which

> permits exclusion prior to trial of those plaintiffs who were not themselves purchasers or sellers of the stock in question. The fact of purchase of stock and the fact

> of sale of stock are generally matters which are verifiable by documentation, and do not depend upon oral recollection . . . . [T]he abolition of the Birnbaum rule would throw open to the trier of fact many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony.

Blue Chip, 421 U.S. at 742-43, 95 S. Ct. at 1928-29.

In *Santa Fe*, the Supreme Court held that Rule 10b-5 does not reach corporate misconduct which does not involve misrepresentations of fact related to the purchase or sale of a security. The Court based its opinion on the fact that the securities laws had been enacted to promote the accurate disclosure of financial information related to the trading of corporate securities. *Santa Fe*, 430 U.S. at 477-78, 97 S. Ct. at 1303. The Court held that Rule 10b-5 should be restrictively interpreted so as not to invade areas of law traditionally governed by state law such as the law of corporate governance, or in this case, contract law. *Id.*

These principles have been consistently applied by the courts of appeal to bar the application of Rule 10b-5 to misrepresentations of a defendant's intention to sell securities. In *Gurwara v. LyphoMed, Inc.*, the Seventh Circuit dismissed a case based on an allegation that the defendant had misrepresented its intention to sell stock pursuant to an option. The court held that "there is no reason to believe that this was the type of misrepresentation Congress meant to proscribe through the federal securities laws" because "the misrepresentation did not go to the value of the stock at issue or the value of the consideration in return for it". *Gurwara*, 937 F.2d at 383.

The same result was reached by the Fourth Circuit in *Hunt v. Robinson* where the court affirmed the dismissal of a claim that the defendant had fraudulently refused to convey stock. The Fourth Circuit noted: "Plaintiff . . . has alleged no misrepresentation of the value of the stock . . . ." *Hunt*, 852 F.2d at 787. The Court held that such allegations could not be

transformed into 10(b) violations "simply because the object of the bargain was shares of stock". *Id.* The Court explained that "[t]he fundamental purpose of [the federal securities law] . . . . is not furthered by bringing within the ambit of § 10(b) claims amounting to breach of contract or common law fraud which have long been staples of state law". *Id.* at 787-88.

These cases mandate the dismissal of this action. The gravamen of plaintiffs' 10(b) claim is that Wharf misrepresented its intention to sell UIH 10% of the stock of CNCL. In denying defendants' motion for summary judgment, the district court held: "Wharf will not be heard to deny liability under Rule 10b-5 because the fraud related to the nonoccurrence of the promised sale, and not to the 'value' of the shares themselves". *United Int'l*, 946 F. Supp. at 869. In so ruling, Judge Kane put himself squarely in conflict with the line of authority set forth above.

The federal securities laws were enacted to regulate the truthfulness of financial disclosures affecting the sale of securities. They are accordingly limited to financial misrepresentations made in connection with the purchase or sale of a security. UIH alleged no such representation. UIH claims only that defendants misrepresented their intention to sell it the stock of CNCL. That claim is governed by state law, not the federal securities laws. UIH's claim is based on its officers' oral testimony about alleged oral representations by a Wharf officer and so involves "many rather hazy issues of historical fact the proof of which depended almost entirely on oral testimony" which the Supreme Court sought to avoid in *Blue Chip*. *See Blue Chip*, 421 U.S. at 743, 95 S. Ct. at 1929.

The district court based its denial of Wharf's motion on the 25-year old case of *Richardson v. MacArthur*, 451 F.2d 35 (10th Cir. 1971). *Richardson* is no longer viable in light of the Supreme Court rulings in *Blue Chip* and *Santa Fe* and the circuit rulings in *Gurwara*, *Hunt* and *Tully v. Mott*

Supermarkets, Inc.[3] The holding of *Richardson* does not control the result in this case, in any event. In *Richardson*, this Court affirmed the trial court's finding that the defendant had fraudulently converted plaintiff's stock. On those facts, the fraud consisted of a conversion, not an alleged misrepresentation or breach of contract. *See Richardson*, 451 F.2d at 40-41.

The obsolescence of *Richardson* was recently demonstrated by the Supreme Court's opinion in *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 114 S. Ct. 1439 (1994), *rev'g, First Interstate Bank of Denver, N.A. v. Pring*, 969 F.2d 891 (10th Cir. 1992). In that opinion, the Supreme Court reemphasized its determination to construe narrowly the liability judicially implied under Rule 10b-5, holding that the Rule does not create aider and abettor liability. That decision reversed a line of cases from this Circuit going back to *Kerbs v. Fall River Industries, Inc.*, 502 F.2d 731 (10th Cir. 1974). In upholding liability, the *Kerbs* Court relied on the same language from *Richardson* relied on by Judge Kane below. *See Kerbs*, 502 F.2d at 739. Just as *Richardson* cannot be used to justify aider and abettor liability, so it cannot be used to expand Rule 10b-5 to disputes over rights to buy stock.

II. UIH FAILED TO PROVE A MISREPRESENTATION "IN CONNECTION WITH THE PURCHASE OR SALE OF [A] SECURITY"

UIH's claims are not actionable under Rule 10b-5 for another reason. UIH did not prove a misrepresentation "in connection with the purchase or sale of [a] security" as required for a 10b-5 claim. To allege "the purchase or sale of [a] security", the party must at least allege a "contract to sell" that

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[3] *Threadgill v. Black*, 730 F.2d 810 (D.C. Cir. 1984), is not to the contrary. In that case, the court held only that the district court's decision that a partially completed sale of stock did not constitute the sale of a security under Rule 10b-5 was erroneous.

stock enforceable under state law. 15 U.S.C. § 78c(a)(14). As demonstrated in section V below, UIH's contract claim is barred by the statute of frauds. Since UIH did not prove an enforceable right to acquire the stock of CNCL, UIH did not prove a misrepresentation made "in connection with the purchase or sale of [a] security".

Federal courts have repeatedly held that plaintiffs must have a right to purchase stock enforceable under the statute of frauds in order to state a viable cause of action under Rule 10b-5. *See, e.g., Pelletier v. Stuart-James Co., Inc.*, 863 F.2d 1550, 1555-56 (11th Cir. 1989). "The principles animating [the statute of frauds] and the doctrine of Blue Chip Stamps alike require a conclusion that an unenforceable oral agreement is not a 'contract' to purchase or sell securities". *Kagan v. Edison Bros. Stores, Inc.*, 907 F.2d 690, 691 (7th Cir. 1990). "[A] person who alleges a violation of Rule 10b-5 must demonstrate that . . . he was a party to a legally enforceable contract to purchase or sell securities". *Southeastern Waste Treatment, Inc. v. Chem-Nuclear Sys., Inc.*, 506 F. Supp. 944, 953 (N.D. Ga. 1980). UIH has, therefore, failed to state a claim under Rule 10b-5 because its alleged oral option is unenforceable.

III. THE RELATIONSHIP BETWEEN WHARF AND UIH IS GOVERNED BY HONG KONG LAW

The district court lacked subject matter jurisdiction over this case because the parties' relations were governed by Hong Kong law. The applicability of Hong Kong law meant that the federal securities laws were not applicable and the district court did not have jurisdiction.

It is well recognized that parties to an international transaction may specify what law is applicable to their relations. As the Supreme Court put it:

> A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is . . . an almost indispensable precondition to achievement of the orderliness and

> predictability essential to any international business transaction.

Scherk v. Alberto-Culver Co., 417 U.S. 506, 516, 94 S. Ct. 2449, 2455-56 (1974); *see also Riley v. Kingsley Underwriting Agencies, Ltd.*, 969 F.2d 953, 957 (10th Cir. 1992).

Hong Kong law is applicable to the relationship between Wharf and UIH, whether that issue is decided as a result of the parties' choice of law or "the most significant relationship" test. The parties' choice of law may be established by formal written contract or inference as to the parties' intent based on other evidence. *See Roberts & Schaefer Co. v. Merit Contracting, Inc.*, 99 F.3d 248, 252-254 (7th Cir. 1996); *Branding Iron Club v. Riggs*, 207 F.2d 720, 724 (10th Cir. 1953).

All of the evidence relating to the parties' choice of law indicates that the parties intended Hong Kong law to apply. The draft shareholders' agreement which Wharf and UIH were negotiating in 1992 contained an express choice of Hong Kong law:

> This Agreement shall be governed by and construed in accordance with the laws of Hong Kong and the parties hereto hereby irrevocably submit to the non-exclusive jurisdiction of the Hong Kong courts. (Add. at 118, 255, 309, 391)

That draft shareholders' agreement was being negotiated at the very time when the oral option allegedly arose on October 8, 1992 and was to embody any binding agreement among Wharf, NYNEX and UIH. All drafts of that agreement throughout the period from September through November 1992 contained a Hong Kong choice of law provision.

The testimony of Messrs. Schneider and Fries, also proves the applicability of Hong Kong law. Mr. Schneider testified:

> If you're a minority, you're particularly interested in those things that can help your investment. . . . *So, we*

> *studied Hong Kong law and we'd become comfortable that at 10%, we weren't that concerned about the core rights.* (Aplt. App. at 3204) (emphasis added)[4]

Mr. Fries testified:

> I mean, our option here was to *accept what Hong Kong law* provided for us as a minority shareholder or to get a few additional things. (Aplt. App. at 4550) (emphasis added)

The same result is dictated by the "most significant relationship" test used to determine the applicable law. *Schoenberg v. Exportadora de Sal, S.A. de C.V.*, 930 F.2d 777, 782 (9th Cir. 1991); *Edelmann v. Chase Manhattan Bank, N.A.*, 861 F.2d 1291, 1294 (1st Cir. 1988). The Restatement (Second) of Conflict of Laws § 148 specifies that in cases of alleged fraud the following factors should be considered in applying the most significant relationship test:

> When the plaintiff's action in reliance took place in whole or in part in a state other than that where the false representations were made, the forum will consider such of the following contacts . . . in determining the state which . . . has the most significant relationship to the occurrence and the parties: (a) the place, or places, where the plaintiff acted in reliance upon the defendant's representations, (b) the place where the plaintiff received the representations, (c) the place where the defendant made the representations, (d) the domicile, residence, nationality, place of incorporation and place of business of the parties, (e) the place where a tangible thing which is the subject of the transaction between the parties was situated at the time, and (f) the place where the plaintiff is to render performance under a

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[4] Even UIH's trial counsel presumed Hong Kong law applied to govern Wharf's treatment of UIH as a potential minority shareholder. (Aplt. App. at 9354)

contract which he has been induced to enter by the false representations of the defendant.

By any test, the most significant relationship in this case is with Hong Kong. Five of the six parties are in Hong Kong—all of the defendants and one of the plaintiffs. Virtually all of the parties' discussions took place in Hong Kong. The services were to be provided by UIH in Hong Kong and the venture was to be located in Hong Kong.

In denying Wharf's motions based on Hong Kong law, the court relied on two propositions. First, the court declined to rule on applicable law because "Wharf has demonstrated no outcome-determinative conflict between U.S. and Hong Kong law". *United Int'l*, 946 F. Supp. at 866 (citing *Eli Lilly & Co. v. Home Ins. Co.*, 764 F.2d 876, 882 (D.C. Cir. 1985)). Second, the court stated: "Instead, the question is whether the securities laws reach Defendants' conduct." *Id.* at 866 n.6.

Whatever justification *Eli Lilly* may provide for avoiding conflict decisions in other circumstances, that decision can have no application here, where the court's jurisdiction depended on the conflicts question. Under Federal Rule of Civil Procedure 12(h)(3), the court is to address any question relating to its subject matter jurisdiction, whenever it arises. When the question is raised at inception, as it was here, the court must address it without delay.

Second, the question is not "whether the securities laws reach Defendants' conduct". The question is whether the federal securities laws or Hong Kong law should be applied to that conduct. That question assumes that the federal securities laws "reach" the conduct. The answer to the question whether the federal securities laws or Hong Kong laws apply is answered by analysis of the parties' intentions and conflict of laws principles, not by the "reach" of federal securities laws.

IV. THIS COURT SHOULD DISMISS THE ENTIRE CASE FOR LACK OF SUBJECT MATTER JURISDICTION

Because UIH had no claim actionable under federal law, the district court lacked jurisdiction and should have dismissed it at the outset. Federal Rule of Civil Procedure 12(h)(3) requires that "[w]henever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction of the subject matter, the court shall dismiss the action." Without a substantial basis for federal jurisdiction, the district court did not have the power to exercise supplemental jurisdiction over the state law claims. It has long been recognized that the exercise of supplemental jurisdiction "requires, at a minimum, a federal claim of sufficient substance to confer subject matter jurisdiction on the court". *Tully*, 540 F.2d at 196 (citation omitted); *see also Thatcher Enters. v. Cache County Corp.*, 902 F.2d 1472, 1478 (10th Cir. 1990); *Lechtner v. Brownyard*, 679 F.2d 322, 327-28 (3d Cir. 1982).

In *Tully v. Mott Supermarkets, Inc.*, the Third Circuit reversed the district court's assertion of jurisdiction and dismissed the entire case, including pendent state claims, after the trial court's decision on the merits in strikingly similar circumstances. As here, the plaintiffs invoked federal jurisdiction under Rule 10b-5 based on a claim that they were entitled to purchase stock. Holding that Rule 10b-5 did not reach such disputes, the circuit court rejected plaintiffs' attempt to preserve the district court's state law findings, holding: "Since there was no substantial federal claim to which the state claims could be appended . . . . the state claims should have been dismissed". *Tully*, 540 F.2d at 196 (citation omitted).

This case clearly meets those criteria for dismissal of the state law claims. UIH should never have brought this case in federal court. Defendants challenged the court's jurisdiction from inception. (Aplt. App. at 36-54, 55-70, 118-26) The court's lack of jurisdiction was obvious from the outset. The complaint plainly disclosed that plaintiffs' claim involved a

dispute over UIH's alleged right to buy stock in CNCL. It was apparent from inception that Hong Kong law was applicable.

In any event, there are no legitimate considerations of judicial efficiency which could warrant preservation of the court's state law judgments. The court's errors in refusing to charge the jury on the statute of frauds or to vacate the jury award because of UIH's failure of proof of liability and damages, among others, require a new trial in any case.

V. UIH'S CLAIMS ARE BARRED BY THE STATUTE OF FRAUDS

UIH's oral option claim is barred by the Colorado statute of frauds. The statute of frauds, renders unenforceable oral contracts to sell securities, Colo. Rev. Stat. § 4-8-319,[5] and oral contracts that are not to be performed within a year, Colo. Rev. Stat. § 38-10-112. UIH's alleged oral option to purchase the common stock is a security barred under Colo. Rev. Stat. § 4-8-319. *See, e.g., Bentley v. ASM Communications, Inc.*, No. 91 Civ. 0086, 1991 WL 105220, at *2-3 (S.D.N.Y. June 11, 1991). Since UIH's obligation under its alleged oral option was to provide 10% of the shareholder capital of CNCL as it was required over a period of years, it was also barred by Colo. Rev. Stat. § 38-10-112. *See In re Frontier Airlines, Inc.*, 121 B.R. 386, 390 (D. Colo. 1990).

The district court refused to charge the jury with respect to the statute of frauds. (Aplt. App. at 1549-55) The court ruled that UIH's alleged oral option was not a security and that UIH's partial performance of the alleged oral contract removed it from the statute of frauds, finding that "[t]here has been no

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[5] Former section 4-8-319 of the Colorado Revised Statutes was repealed during the pendency of this action. Laws 1996, S.B. 96-132 § 2, July 1, 1996. The Colorado legislature did not make the repeal retroactive. The statute was an affirmative defense available when this action was initiated and still applies to bar UIH's claims.

evidence of any other agreement or obligation that compelled UIH's performance . . . ." (Aplt. App. at 1552)

In taking the statute of frauds question from the jury and ruling, as a matter of law, that UIH was excused from compliance because of partial performance, the court ignored controlling authority holding that the question of partial performance is a question of fact to be determined by the jury. This Court so held in *Lobato v. Bleidt*, ruling that "whether part performance of an oral contract is substantial enough to take the contract out of the statute of frauds is . . . a factual question". *Lobato v. Bleidt*, Nos. 94-1264, 94-1275, 1995 WL 307609 at *1 (10th Cir. May 11, 1995) (unpublished disposition) (citations omitted).

The lower court's refusal to charge the jury on the statute of frauds was unjustified. In taking that issue from the jury, the court determined, as a matter of law, the central factual question in the case. Wharf's position throughout was that UIH had performed services relating to the cable TV project in the hope of persuading Wharf to sell it 10% of the stock of CNCL. (Aplt. App. at 8175-76) Given that evidence, there was no basis upon which the court could conclude that UIH's services were referable to no theory other than the alleged oral agreement, much less take that question away from the jury.

In taking the question from the jury, the court also applied the wrong legal standard. As the Colorado Supreme Court has recently stated the standard in *Nelson v. Elway*:

> The part performance doctrine will apply if there is part performance of an oral contract which is: (1) substantial; and (2) required by, and fairly referable to no other theory besides that allegedly contained within the oral agreement. This rule is based on the premise that the conduct constituting the partial performance must convincingly evidence the existence of the oral agreement.

Nelson v. Elway, 908 P.2d 102, 108-09 (Colo. 1996) (en banc) (citations omitted); *see also L.U. Cattle Co. v. Wilson*, 714 P.2d

1344, 1347 (Colo. Ct. App. 1986). The court's decision to take the statute of frauds question away from the jury on the grounds that there was no evidence of another "obligation" which "compelled UIH's performance" is inconsistent with controlling Colorado law. Under Colorado law, no such evidence is required. Under Colorado law, the burden of avoiding the statute of frauds was on UIH, and to discharge the burden, UIH had to prove there was no other theory to which UIH's partial performance was referable and to do so convincingly. *See Nelson*, 908 P.2d at 108-09. Given Wharf's proof that UIH performed its services in the hope of persuading Wharf to sell it 10% of the stock of CNCL, it was impossible for UIH to meet that burden.

What is more, UIH is barred from reliance on the partial performance doctrine because under Colorado law, a party may not rely on partial performance to avoid the statute of frauds where the performance is alleged to have been in reliance on a conditional promise. In *Nelson v. Elway*, the Colorado Supreme Court held:

> We hold that when a defendant makes a conditional representation to a plaintiff . . . any detrimental change of position on the part of the plaintiff prior to the occurrence of the condition is unreasonable as a matter of law.

Nelson, 908 P.2d at 110. All of UIH's draft MOUs submitted to Wharf during 1993 made the parties' obligations conditional on their subsequent approval. The very last draft MOU sent by Mr. Schneider to Wharf on November 5, 1993 said:

> UIH's investment in CNCL is conditioned upon the approval of the board of UIH and WCIL. (Add. at 623)

That MOU was the last documented version of UIH's alleged agreement and it remained explicitly conditional. Accordingly, under *Nelson v. Elway*, any reliance on Wharf's alleged conditional promise was unreasonable as a matter of law.

The district court's refusal to charge the jury on the statute of frauds question requires vacatur of all of the liability

verdicts. Unless UIH has proven a contractual right enforceable under state law, it has established no "injury" which would support a recovery under any theory. The court's refusal to charge the jury plainly requires vacatur of the jury's breach of contract verdict. This error also requires vacatur of the breach of fiduciary duty verdict because that verdict required the jury to find the existence of a joint venture agreement. (Aplt. App. at 1569, 1579) Since that agreement was not to be performed within a year, it was subject to the Colorado statute of frauds, Colo. Rev. Stat. § 38-10-112.

The vacatur of the jury verdict on UIH's breach of contract claims means that UIH did not prove an enforceable right to purchase stock required by the federal securities laws. Therefore, the court's statute of frauds error requires vacatur of its federal securities verdict. Because the Colorado securities law is interpreted in a manner consistent with federal securities law, the jury's state securities law verdict must also be vacated. *People v. Milne*, 690 P.2d 829, 833 (Colo. 1984) (en banc); *Broadview Fin., Inc. v. Entech Management Servs. Corp.*, 859 F. Supp. 444, 452 (D. Colo. 1994).

The same is true of the jury's common law fraud verdict. To withstand reversal, a successful fraud plaintiff must prove falsehood, scienter, reliance and injury. *See Southeastern Colorado Water Conservancy Dist. v. Cache Creek Mining Trust*, 854 P.2d 167, 172 (Colo. 1993) (en banc). In order to recover for an alleged fraud, UIH must prove its alleged injury. The jury awarded UIH its alleged contractual expectancy as damages for fraud.

As the Eleventh Circuit held in *Pelletier v. Stuart-James Co., Inc.*:

> The law is clear that an action for fraud may not be predicated on inducing a party to enter into an unenforceable contract. . . . The strictly compensatory nature of damages awardable in private securities fraud action[s] requires that the defrauded party show

> more than a mere loss of a noncontractual opportunity to buy or sell securities.

Pelletier, 863 F.2d at 1556-57; *see also Caplan v. Roberts*, 506 F.2d 1039, 1041-42 (9th Cir. 1974); *Gregg v. U.S. Indus., Inc.*, 715 F.2d 1522, 1531 (11th Cir. 1983). Under Colorado law, an unenforceable contract may provide the basis for proof of injury in a fraud case, but only for a plaintiff's reasonable reliance damages, *not* for his contractual expectation. The Supreme Court so held in *Brody v. Bock*, 897 P.2d 769, 776 (Colo. 1995) (en banc), ruling:

> The content of the allegedly fraudulent statement is material not for the purpose of requiring Brody to perform the promise but for the purpose of establishing that Bock acted reasonably but detrimentally in justifiable reliance upon the false statement.

These principles are consistent with Colorado law regarding the measure of damages for fraudulent misrepresentation. In measuring damages for fraudulent misrepresentation, Colorado courts follow the principles laid out in Section 549 of the Restatement (Second) of Torts. *See Elliott v. Aspen Brokers, Ltd.*, 811 F. Supp. 586, 590-91 (D. Colo. 1993). The Restatement dictates that if the plaintiff does not consummate the transaction, the plaintiff may recover only its pecuniary loss, *not* the benefit of his bargain. *See Gold v. Dubish*, 193 Ill. App. 3d 339, 352, 549 N.E.2d 660, 667, 140 Ill. Dec. 9, 16 (Ill. App. Ct. 1989). If plaintiff has not consummated the transaction, there is no "bargain" of which the plaintiff was deprived. *See Pelletier*, 863 F.2d at 1559 (""benefit of the bargain' damages [requires] a 'bargain' or contract").

The court's statute of frauds error also requires vacatur of the jury's negligent misrepresentation verdict. Unlike the other compensatory damage awards of $67,000,000, the jury's negligent misrepresentation award of $8.1 million was apparently (though not certainly) based on the jury's overgenerous estimate of the value of UIH's reliance efforts.

As shown above, damages may not be based on reliance on a conditional promise under Colorado law.

The facts of this case cry out for application of the statute of frauds. Wharf was proceeding with its negotiations in a documented context which proves beyond doubt its intention to be bound only upon approval and execution of a written shareholders' agreement. The statute of frauds, enacted for the purpose of barring fraudulent assertions of oral agreements to circumvent the parties' failure to reach a written agreement, is clearly applicable to the facts of this case.

VI. UIH'S TORT CLAIMS ARE BARRED BY THE ECONOMIC LOSS RULE

UIH's tort claims are barred by the Economic Loss Rule which bars the assertion of tort claims where a plaintiff complains of a defendant's refusal to perform a contract and seeks to recover its alleged economic loss in the form of its contractual expectancy. Colorado, like many other states, has adopted the Economic Loss Rule. *See, e.g., Jardel Enters., Inc. v. Triconsultants, Inc.*, 770 P.2d 1301, 1303 (Colo. Ct. App. 1988). This Court has recognized the applicability of the Economic Loss Rule in Colorado. *See, e.g., Perlmutter v. U.S. Gypsum Co.*, 4 F.3d 864, 868 (10th Cir. 1993); *Adams-Arapahoe School Dist. No. 28-J v. GAF Corp.*, 959 F.2d 868, 871 (10th Cir. 1992). The Economic Loss Rule was recently described by the Colorado District Court in the following terms:

> As a general rule, no cause of action lies in tort when purely economic damage is caused by a breach of a contractual duty. *Jardel*, 770 P.2d at 1303. This "economic loss rule" prevents recovery in tort when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract. *Id.* The rule prohibits parties who deal with each other at arms length through contractual arrangements from circumventing their bargained-for contractual remedies by attempting to recover purely

> pecuniary losses in tort. . . . [P]ermitting parties to recover economic losses under a tort theory "would frustrate" the ability of contracting parties to allocate the risk of loss and, therefore, "would undermine" certainty in commercial practices.

Commercial Union Ins. Co. v. Roxborough Village Joint Venture, 944 F. Supp. 827, 831 (D. Colo. 1996) (quoting *Colorado Nat'l Bank of Denver v. Adventura Assocs., L.P.*, 757 F. Supp. 1167, 1172-73 (D. Colo. 1991)).

The facts of this case call out for application of the Economic Loss Rule. UIH's claim rests on its allegation that Wharf did not perform its alleged oral agreement to sell UIH 10% of the stock of CNCL and intentionally misrepresented its intention. UIH's $67,000,000 recovery represents pure economic loss, that is, UIH's alleged loss of the profit from performance of the alleged contract. UIH's allegations, therefore, satisfy the two basic criteria for application of the Economic Loss Rule: UIH complains of (1) "purely economic damage" (2) arising from an alleged "breach of contractual duty".

The Economic Loss Rule should be applied in this case to bar UIH's recovery on its state law tort claims, including those for negligent misrepresentation, breach of fiduciary duty and fraud. The Colorado courts have applied the Economic Loss Rule to bar negligence claims. *See Jardel*, 770 P.2d at 1304. UIH's breach of fiduciary duty claim is likewise dismissable under the Economic Loss Rule because it depends on UIH's allegation of economic loss arising from a breach of contract. To permit UIH to recover by a breach of fiduciary duty claim is but another way of using the tort law to circumvent the limitations of contract law.

The Economic Loss Rule is as applicable to UIH's claim of intentional misrepresentation as it is to its claim of negligent misrepresentation. It has been so applied by numerous courts. *See, e.g., Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198, 1199-1200 (11th Cir. 1994); *Allmand Assocs., Inc.*

v. Hercules, Inc., 960 F. Supp. 1216, 1227 (E.D. Mich. 1997); *AKA Distrib. Co. v. Whirlpool Corp.*, 948 F. Supp. 903, 906 (D. Minn. 1996), *aff'd*, No. 97-1412, 1998 WL 95023 (8th Cir. Mar. 6, 1998); *Standard Platforms, Ltd. v. Document Imaging Sys. Corp.*, No. Civ. 93-20993, 1995 WL 691868, at *3 (N.D. Cal. Nov. 15, 1995); *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74, 77 (Fla. Dist. Ct. App. 1997); *Puff 'N Stuff of Winter Park, Inc. v. Bell*, 683 So.2d 1176, 1179-80 (Fla. Dist. Ct. App. 1996) (Harris, *J.*, concurring). The limitations of contract law can be as easily avoided by allegations of intentional as of negligent misrepresentation. As the Florida District Court of Appeal put it, any other rule would mean that

> anytime one breaches a contract, the other side merely needs to allege that the breaching party never intended to honor its commitment and thus is liable for fraud in the inducement.

Puff 'N Stuff, 683 So.2d at 1179 (Harris, *J.*, concurring).

The Economic Loss Rule is applicable to bar UIH's fraud claim in this case because UIH's claim is limited to its allegations that Wharf misrepresented its intention to perform the alleged oral option agreement. UIH's claims, therefore, do not allege any basis for a fraud claim independent of its breach of contract claim, rendering cases such as *Klein v. Grynberg*, 44 F.3d 1497, 1503 n.3 (10th Cir. 1995) inapplicable. In such cases, plaintiffs allege tortious conduct independent of the claim that defendant breached its contract and misrepresented its intent to perform. Here, UIH makes no such allegation and, therefore, asserts no independent tort claim.

As a general rule, no cause of action lies in tort when purely economic damage is caused by a breach of a contractual duty. *Jardel*, 770 P.2d at 1303. This "economic loss rule" prevents recovery in tort when the duty breached is a contractual duty and the harm incurred is the result of failure of the purpose of the contract. *Id.* The rule prohibits parties who deal with each other at arms length through contractual arrangements from circumventing their bargained-for contractual remedies by

attempting to recover purely pecuniary losses in tort. . . . [P]ermitting parties to recover economic losses under a tort theory "would frustrate" the ability of contracting parties to allocate the risk of loss and, therefore, "would undermine" certainty in commercial practices.

Commercial Union Ins. Co. v. Roxborough Village Joint Venture, 944 F. Supp. 827, 831 (D. Colo. 1996) (quoting *Colorado Nat'l Bank of Denver v. Adventura Assocs., L.P.*, 757 F. Supp. 1167, 1172-73 (D. Colo. 1991)).

The facts of this case call out for application of the Economic Loss Rule. UIH's claim rests on its allegation that Wharf did not perform its alleged oral agreement to sell UIH 10% of the stock of CNCL and intentionally misrepresented its intention. UIH's $67,000,000 recovery represents pure economic loss, that is, UIH's alleged loss of the profit from performance of the alleged contract. UIH's allegations, therefore, satisfy the two basic criteria for application of the Economic Loss Rule: UIH complains of (1) "purely economic damage" (2) arising from an alleged "breach of contractual duty".

The Economic Loss Rule should be applied in this case to bar UIH's recovery on its state law tort claims, including those for negligent misrepresentation, breach of fiduciary duty and fraud. The Colorado courts have applied the Economic Loss Rule to bar negligence claims. *See Jardel*, 770 P.2d at 1304. UIH's breach of fiduciary duty claim is likewise dismissable under the Economic Loss Rule because it depends on UIH's allegation of economic loss arising from a breach of contract. To permit UIH to recover by a breach of fiduciary duty claim is but another way of using the tort law to circumvent the limitations of contract law.

The Economic Loss Rule is as applicable to UIH's claim of intentional misrepresentation as it is to its claim of negligent misrepresentation. It has been so applied by numerous courts. *See, e.g., Hoseline, Inc. v. U.S.A. Diversified Prods., Inc.*, 40 F.3d 1198, 1199-1200 (11th Cir. 1994); *Allmand Assocs., Inc.*

v. Hercules, Inc., 960 F. Supp. 1216, 1227 (E.D. Mich. 1997); *AKA Distrib. Co. v. Whirlpool Corp.*, 948 F. Supp. 903, 906 (D. Minn. 1996), *aff'd*, No. 97-1412, 1998 WL 95023 (8th Cir. Mar. 6, 1998); *Standard Platforms, Ltd. v. Document Imaging Sys. Corp.*, No. Civ. 93-20993, 1995 WL 691868, at *3 (N.D. Cal. Nov. 15, 1995); *Hotels of Key Largo, Inc. v. RHI Hotels, Inc.*, 694 So.2d 74, 77 (Fla. Dist. Ct. App. 1997); *Puff 'N Stuff of Winter Park, Inc. v. Bell*, 683 So.2d 1176, 1179-80 (Fla. Dist. Ct. App. 1996) (Harris, *J.*, concurring). The limitations of contract law can be as easily avoided by allegations of intentional as of negligent misrepresentation. As the Florida District Court of Appeal put it, any other rule would mean that

> anytime one breaches a contract, the other side merely needs to allege that the breaching party never intended to honor its commitment and thus is liable for fraud in the inducement.

Puff 'N Stuff, 683 So.2d at 1179 (Harris, *J.*, concurring).

The Economic Loss Rule is applicable to bar UIH's fraud claim in this case because UIH's claim is limited to its allegations that Wharf misrepresented its intention to perform the alleged oral option agreement. UIH's claims, therefore, do not allege any basis for a fraud claim independent of its breach of contract claim, rendering cases such as *Klein v. Grynberg*, 44 F.3d 1497, 1503 n.3 (10th Cir. 1995) inapplicable. In such cases, plaintiffs allege tortious conduct independent of the claim that defendant breached its contract and misrepresented its intent to perform. Here, UIH makes no such allegation and, therefore, asserts no independent tort claim.

VII. UIH FAILED TO INTRODUCE EVIDENCE LEGALLY SUFFICIENT TO PROVE ITS ALLEGED ORAL OPTION; THE EVIDENCE CONCLUSIVELY PROVES THAT WHARF AND UIH INTENDED TO BE BOUND ONLY BY A DEFINITIVE WRITTEN AGREEMENT, APPROVED BY THEIR BOARD OF DIRECTORS AND DULY EXECUTED

The jury verdict should be set aside because UIH failed to introduce legally sufficient evidence of its alleged oral option. Courts of appeal have repeatedly reversed verdicts finding contractual liability where a plaintiff has attempted to prove an oral agreement in conflict with the documentary record of negotiation. *See, e.g., Winston v. Mediafare Entertainment Corp.*, 777 F.2d 78, 80-81 (2d Cir. 1986) (reversing trial court's findings of contractual liability); *Reprosystem, B.V. v. SCM Corp.*, 727 F.2d 257, 261-62 (2d Cir. 1984) (same).

UIH's oral option allegation is flatly inconsistent with the documentary record of the parties' negotiations. Those negotiations began with a letter of intent drafted in August and September 1992 which stated: "This letter does not create legally binding and enforceable obligations . . . ." and that "[e]ach of the parties will negotiate . . . the terms of a formal, legally binding shareholders' agreement . . . ." (Add. at 43, 46-47)

UIH and Wharf proceeded to negotiate the terms of a draft shareholders' agreement between September 16, 1992 and November 19, 1992. (Add. at 64, 205, 258, 340) All drafts of that agreement provided that it "supersedes and invalidates all commitments, representations, warranties and other agreements relating to the subject matter hereof . . . either orally or in writing . . . ." (Add. at 115, 252, 306, 388) Those documents conclusively prove that UIH and Wharf understood that any agreement between them would be in writing. They conclusively prove that Wharf and UIH understood that they would proceed from a nonbinding letter of intent to a binding

shareholders' agreement—a process flatly inconsistent with UIH's alleged oral option of October 8, 1992.

UIH's oral option allegation is also flatly inconsistent with the fact that all of the draft letters of intent and draft shareholders' agreements under negotiation during 1992 involved an *obligation* on the part of UIH to purchase stock, *not an option*. (Add. at 44, 55, 60, 123, 130, 137, 144, 66, 208, 261, 356) That was true of all of the draft shareholders' agreements—dated September 16, 1992 (Add. at 64), October 26, 1992 (Add. at 205), November 4, 1992 (Add. at 258) and November 19, 1992 (Add. at 340)—both before and after the alleged October 8, 1992 oral option. UIH's Mr. Fries went to Hong Kong in November 1992, after the alleged oral agreement, to further negotiate the terms of the shareholders' agreement. Yet the November 19, 1992 draft which emerged from these negotiations not only said nothing about the alleged oral option, it was flatly inconsistent with that option because it obligated UIH to buy stock in CNCL: "Immediately following the signing of this Agreement the Shareholders shall deliver to the Company unconditional applications in writing addressed to the Company for the allotment to them at par of the following number of Shares . . . UIH: [ ] shares . . . ." (Add. at 356) Moreover, that agreement expressly voided UIH's alleged oral option: "This agreement supersedes and invalidates all . . . agreements relating to the subject matter hereof which may have been made by the Shareholders [Wharf, UIH and NYNEX] either orally or in writing prior to or contemporaneously with the date hereof, and which, if any exist, shall now become invalid . . . ." (Add. at 388) The draft shareholders' agreement thus obligated UIH to purchase the stock of CNCL; it did not grant UIH an option to purchase such stock; it also explicitly rendered UIH's alleged oral option invalid. If Wharf had actually granted UIH an oral option agreement on October 8, 1992, Mr. Fries would surely have amended the shareholders' agreement to provide for UIH's alleged oral option. He did not.

When NYNEX postponed its investment decision at the end of 1992, Mr. Ng told Mr. Schneider that Wharf had decided to put ownership issues on hold until after the cable TV service was launched in October 1993. (Add. at 394, 395, 396; Aplt. App. at 7583) Mr. Ng told Mr. Schneider that in a telephone conversation in January 1993, in a meeting on January 24, 1993 in London and in a letter dated February 27, 1993. (*Id.*) There is no documentary evidence that any communication protesting Mr. Ng's statements or asserting the alleged October 8 option was ever sent.

UIH did not send Wharf any draft agreement until April 30, 1993 when Mr. Fries wrote to Mr. Fung, transmitting a draft MOU. (Add. at 398-406) That delay alone is powerful evidence that the alleged October 8, 1992 conversation never took place. Even more powerful evidence is the fact that Mr. Fries' letter and MOU are inconsistent with UIH's oral option story. In the letter, Mr. Fries admitted that "[w]e left the issue of UIH's ownership in Stephen's [Mr. Ng's] hands". (Add. at 398) Neither the letter nor the MOU make any reference to UIH's alleged October 8 option agreement. The 1993 draft MOUs were different from the 1992 letters of intent in one significant respect. Unlike the letters, the draft MOUs purported to be legally enforceable agreements: "This Agreement is legally binding upon both parties and shall remain in effect for 180 days . . . ." (Add. at 406; *see also* Add. at 415, 425, 437, 628) That difference serves to underscore the fact that UIH and Wharf plainly understood in the Fall of 1992 that the draft letters of intent were not legally enforceable. The 1993 draft MOUs also prove that UIH understood that any agreement between the parties would be in writing, since the MOU was, itself, a written agreement. (Add. at 406, 415, 425, 437, 627)

The 1993 MOUs drafted by UIH also consistently provided that any investment by UIH pursuant to the MOU remained subject to the approval of both of UIH and Wharf. The April 30 MOU provided that UIH's acquisition was "conditioned upon . . . approval by both UIH and Wharf" of

"the Pay TV Business Plan" and "the Shareholder's Agreement". (Add. at 401) The November 5 draft MOU provided: "UIH's investment in CNCL is conditioned upon the approval of the board of UIH and WCIL". (Add. at 623; Aplt. App. at 6749-51) That is, the very last written form of UIH's alleged agreement made any binding agreement subject to the consent of WCIL's Board of Directors. And it is undisputed that the draft MOU was never approved by the Wharf Board.

On facts such as these, federal courts have repeatedly reversed findings of contractual liability or sustained summary judgment decisions finding evidence of alleged oral agreements to be legally insufficient. *See, e.g., Aircraft Sales of California, Inc., v. Insured Aircraft Title Serv., Inc.*, No. 90-6125, 1991 WL 274101, at *1 (10th Cir. Dec. 18, 1991) (unpublished disposition); *Winston*, 777 F.2d at 81-83; *R. G. Group, Inc. v. Horn & Hardart Co.*, 751 F.2d 69, 77 (2d. Cir. 1984); *Reprosystem*, 727 F.2d at 262-63; *see also Fox News Network, L.L.C. v. Time Warner, Inc.*, No. 96-CV-4963, 1997 WL 271720, at *1 (E.D.N.Y. May 16, 1997); *Chariot Group, Inc. v. American Acquisition Partners, L.P.*, 751 F. Supp. 1144, 1149-52 (S.D.N.Y. 1990), *aff'd*, 932 F.2d 956 (2d Cir. 1991) (Table); *PDL Vitari Corp. v. Olympus Indus., Inc.*, 718 F. Supp. 197, 206-208 (S.D.N.Y. 1989). In determining whether there is sufficient evidence that the parties intended to be bound by an oral agreement, the standard to be applied has been articulated in the following terms:

> The court is to consider (1) whether there has been an express reservation of the right not to be bound in the absence of a writing; (2) whether there has been partial performance of the contract; (3) whether all of the terms of the alleged contract have been agreed upon; and (4) whether the agreement at issue is the type of contract that is usually committed to writing.

Winston, 777 F.2d at 80 (citation omitted); *see In re S & D Foods, Inc.*, 144 B.R. 121, 157-158 (Bankr. D. Colo. 1992) (applying *Winston* as Colorado law). The court below

acknowledged the applicability of these factors. *United Int'l*, 946 F. Supp. at 868 n.7.

Application of these criteria to the facts of this case call out for reversal. There is no question that there was an express reservation of the right not to be bound in the absence of a written agreement. All of the draft letters of intent expressly disclaimed any legal obligation -- "This letter does not create legally binding and enforceable obligations . . . ." -- and looked to "conclude the terms of a formal, legally binding shareholders' agreement". (Add. at 43, 46, 53, 57, 58, 63, 121, 126, 128, 133, 135, 140, 142, 147) As the court observed in *Chariot Group, Inc. v. American Acquisition Partners, L.P.*:

> The language the parties use in their draft agreements and in their contemporaneous communications is the most important indication of whether a signed writing is required before the parties are bound.

Chariot Group, 751 F. Supp. at 1149 (citing *R. G. Group*, 751 F.2d at 75).

The draft shareholders' agreements contained a clause which stated that they superseded and invalidated any oral agreement relating to their subject matter. (Add. at 115, 252, 306, 388) That clause was contained in all versions of the draft shareholders' agreement during the period from September 16, 1992 to November 19, 1992, spanning the alleged October 8, 1992 oral option agreement. In assessing the significance of such a clause, the Second Circuit has held:

> Thus, the contract drafts, combined with the parties' other written communications, *conclusively* establish a mutual intent not to be bound prior to execution of the formal documents, and the district court's finding to the contrary is clearly erroneous.

Reprosystem, 727 F.2d at 262 (emphasis added). The parties' draft letters of intent and draft shareholders' agreements "conclusively" prove that UIH and Wharf did not intend to be bound before execution of the written shareholders' agreement.

The other criteria for demonstrating the parties' intent to require a written document are easily met. The subject of those agreements, involving the Hong Kong cable TV system and an investment of $500,000,000, was sufficiently complex that a written contract is the norm rather than the exception. The draft shareholders' agreements were over 50 pages in length. By comparison to other cases, this case easily satisfies the complexity criterion. As the court said in *Winston v. Mediafare Entertainment Corp.*,

> the $62,500 at issue is not a trifling amount, and payment was to be made over several years based on a percentage of earnings. Although the agreement consisted of only four pages, the parties evidently thought the terms and language used were complex enough to require substantial redrafting.

Winston, 777 F.2d at 83; *see also R.G. Group*, 751 F.2d at 77.

As of October 8, 1992, there also remained many unresolved issues, including, most importantly, the entire business plan of the venture which determined the cost of an interest in CNCL and UIH's ability to fund that purchase.

As the court put it in *Winston*:

> It is not for the court to determine retrospectively that at some point in the evolution of a formal document that the changes being discussed become so "minor" or "technical" that the contract was binding despite the parties' unwillingness to have it executed and delivered.

Winston, 777 F.2d at 83.

There remains the issue raised by UIH's claim of partial performance. As shown above, UIH's efforts relating to the franchise can be easily explained as efforts by UIH to persuade Wharf to sell UIH stock in the venture. But this Court need not decide between those interpretations of UIH's efforts. Under Colorado law, partial performance in alleged reliance on a conditional promise may not be used to avoid a written

contract. *See Nelson*, 908 P.2d at 108-11. Since all of UIH's draft MOUs retained the parties' subsequent approval as conditions, UIH may not use partial performance as a means of avoiding a written contract.

Apart from the *Nelson v. Elway* holding, UIH cannot now be heard to repudiate a consent condition which UIH consistently incorporated in its own written expression of its alleged agreement—a condition which remained in the last written version of its alleged agreement, the November 5, 1993 draft MOU. (Add. at 623) Since the Wharf Board never consented to UIH's investment at any time, UIH's alleged agreement was, by its own terms, never consummated.

VIII. UIH FAILED TO PROVE THE VALUE OF ITS OPTION TO PURCHASE 10% OF THE CABLE TV SYSTEM AND MISREPRESENTED THE TESTIMONY OF ITS DAMAGES WITNESS TO THE JURY

The jury's damage verdict should be vacated because counsel for UIH failed to prove the value of UIH's alleged option and misrepresented the testimony of its damages expert, Mr. Robert Jones. Demonstration of UIH's failure of proof and misrepresentation rests on five simple propositions:

(1) UIH alleged that it had been deprived of the value of an option to purchase 10% of the stock of CNCL in exchange for providing 10% of the shareholder capital.

(2) The value of UIH's alleged option was the difference between the value of 10% of the stock of the cable TV system and the price which UIH had to pay to exercise the option.

(3) UIH's damages expert did not value UIH's alleged option. He estimated the value of a 10% stockholding in CNCL at $67,000,000. He did not deduct the price which UIH had to pay to exercise its option—a price guesstimated at $50,000,000 or more.

(4) UIH's counsel misrepresented Mr. Jones' $67,000,000 valuation as a valuation of UIH's alleged option.

(5) In awarding damages of $67,000,000, the jury was misled by UIH's counsel's misrepresentation.

Wharf respectfully submits that these five propositions are indisputable and dispositive.

First, it is undisputed that UIH claimed that it had been deprived of an option to purchase 10% of the stock of CNCL in exchange for contributing 10% of the shareholder capital required. UIH made this claim repeatedly in its Amended Complaint. (Aplt. App. at 71, 77 *et seq.*) UIH reiterated that claim throughout its opening, (Aplt. App. at 2186-87, 2197-99, 2235-36), and its closing (Aplt. App. at 10110-11, 10116).

UIH repeatedly admitted that it would have to pay or invest 10% of the shareholder capital to exercise its alleged option. (Aplt. App. at 83, 2199, 2212, 2236) Since the shareholder capital was estimated in excess of $500,000,000, UIH's exercise price would have been at least $50,000,000.

Second, the value of an option to purchase stock is the difference between the value of the stock and the price to be paid on exercise of the option. *See, e.g., Hermanowski v. Acton Corp.*, 729 F.2d 921, 922 (2d Cir. 1984) (per curiam) ("the proper measure of damages is the difference between the market value of the stock and the option price").

Third, UIH did not prove the value of its alleged option. UIH proved only the value of a 10% stock interest in CNCL. Mr. Jones placed a value of $67,000,000 on that stock interest. (Aplt. App. at 8287) That $67,000,000 valuation was not, however, the value of UIH's alleged option. It was the value of a 10% stock interest in the system. Mr. Jones did not deduct the amount of the exercise price which UIH would have had to pay; that is, 10% of the shareholder capital.

The fact that Mr. Jones did not value UIH's option, that he did not deduct the price which UIH would have to pay to

exercise its option, is beyond dispute. It was established in his direct examination, on cross examination and in his report.

On direct examination, Mr. Jones was asked "to teach us generally how you value a cable television system" (Aplt. App. at 8232); he was asked about the "various methodologies that you can use in valuing a cable television system" (Aplt. App. at 8248). He testified that "we have a combination of things that we're looking at as far as the value of the company". (Aplt. App. at 8275) He is then asked: "I want to question you specifically about the valuation you did first as of March 1994. Do you remember expressing an opinion . . . that that was a $67 million value to UIH?" Jones answered, "Yes." (Aplt. App. at 8287)

On cross examination, Mr. Jones was asked whether he valued an option or a 10% stockholding in CNCL. He testified: "I valued a ten percent economic interest of CNCL". (Aplt. App. at 8447) He was asked: "You valued—what you did was to value a ten percent ownership interest in the cable company; right?" He answered, "Yes." (*Id.*)

Mr. Jones' report, itself, makes it crystal clear that he was valuing a 10% stock interest in the system, that he was not valuing UIH's alleged option, and that he did not deduct the exercise price which UIH had to pay. (*Id.*) Mr. Jones repeatedly described his study as "valuations of Wharf's cable television system in Hong Kong" (Add. at 649), as "determining the value of the cable television system in Hong Kong" (Add. at 650), and as "discounted cash flow valuations for the system" (Add. at 651).

Mr. Jones' study is a conventional discounted cash flow ("DCF") valuation of the cable TV system. (Add. at 651) The study consists of three slightly different DCF valuations of the system made as of two dates, October 1992 and March 1994. (Add. at 650-52) In performing his study, Mr. Jones first estimated the total revenues of this system over a period of 10 years. (Add. at 651) He then estimated the total costs of building and operating the system—current expense and capital

expenditure—over the 10 year period and deducted those costs from the revenues. (Add. at 651) He discounted the excess of revenue over costs during the initial 10 years to present value, applied a multiple to the system's income in the tenth year and added those two values to estimate the value of the system. (Add. at 652-54) He then took 10% of this system's total value as representing UIH's alleged share and valued it at $67,000,000. (Add. at 657)

UIH did not ask Mr. Jones a single question about UIH's alleged option. He was not asked to value that option. He was not asked to determine the price UIH would have to pay in order to exercise its alleged option. He was not asked to deduct that price from his valuation of 10% of the stock of Wharf's cable system. (Aplt. App. at 8447-48)

Fourth, UIH's counsel misrepresented the Jones study to the jury. In closing argument, he said:

> On the contract damages, UIH is awarded the benefit of its bargain with Wharf. . . . And that would have been the valuations that Mr. Jones did, that was the second valuation and that was the $67 million valuation as of that date. Now, keep in mind also, and I'll talk about this on damages, *when we use these numbers, 50 million value, 67 million value, whatever, this is over and above the investment.* So if UIH has to put 50 million into the project and the project, lets say its got a value of 67, *we mean 67 over and above the 50.* So the 67 is the net figure. It would actually be if you're adding the two together, $117 million, minus the 50. So—so I just want to make sure that you understand that, that *we don't subtract out the investment. The appraiser already does that.* (Aplt. App. at 10163-64) (emphasis added)

Plaintiffs' counsel repeatedly told the jury that UIH's right to acquire 10% of the stock of CNCL was calculated by Mr. Jones to be worth $67 million. He also told the jury that the $67,000,000 should not be reduced to take account of

UIH's obligation to pay an exercise price. (Aplt. App. at 10163-65, 10177)

Fifth, the jury was misled by UIH's counsel's misrepresentation of the Jones' study in awarding UIH $67,000,000 in compensatory damages. In making that award, the jury simply accepted Mr. Jones $67,000,000 valuation of 10% of the cable TV system. There is no other plausible explanation for the jury verdict.

The jury was misled despite strenuous efforts by Wharf's counsel to correct the misinterpretation. Wharf's counsel repeatedly forced Mr. Jones to admit that he did not value UIH's option. (Aplt. App. at 8447-48) Wharf's counsel stressed Mr. Jones' failure to value UIH's option in closing. (Aplt. App. at 10254-55, 10272-73) His efforts failed and the jury was misled.

The misconduct of UIH's counsel requires vacatur of all of the jury's compensatory damage awards except for the negligent misrepresentation award because all of those awards of $67,000,000 were obviously based on UIH's counsel's misrepresentation of the Jones study. That misrepresentation also requires vacatur of the jury's punitive damage award because punitive damages cannot exceed compensatory damages. Colo. Rev. Stat. § 13-21-102(1)(a).

IX. THE JURY'S COMPENSATORY DAMAGE AWARD SHOULD BE VACATED BECAUSE IT IS SPECULATIVE AND GROSSLY EXCESSIVE, BECAUSE THE TRIAL COURT EXCLUDED EVIDENCE OF WHARF CABLE'S ACTUAL PERFORMANCE AND BECAUSE THE COURT FAILED TO INSTRUCT ON MITIGATION

The jury's compensatory damage award was grossly excessive and based on sheer speculation. UIH was awarded $67,000,000 in compensatory damages even though UIH never made any investment in the Wharf Cable system and incurred only $900,000 in expenses. (Aplt. App. at 9164) In reviewing the reasonableness of any compensatory damage award, "the

only guide available . . . is a comparison of amount with the injury". *Malloy v. Monahan*, 73 F.3d 1012, 1017 (10th Cir. 1996) (citation omitted). Since UIH's contractual entitlement was unenforceable, UIH's expenses are the only relevant measure of any alleged injury. *See Brody*, 897 P.2d at 776; *Pelletier*, 863 F.2d at 1556-57. UIH's expenditures of $900,000 obviously cannot justify an award of $67,000,000.

The jury's grossly excessive award was based on sheer speculation. Courts in this Circuit have repeatedly struck down damage awards based on the anticipated profits of businesses not yet in existence. *See, e.g., Sunward Corp. v. Dun & Bradstreet, Inc.*, 811 F.2d 511, 541 (10th Cir. 1987); *Western Cities Broadcasting, Inc. v. Schueller*, 849 P.2d 44, 47-50 (Colo. 1993) (en banc). In *King v. United States*, 292 F. Supp. 767, 776 (D. Colo. 1968), the District Court of Colorado ruled:

> [A]nticipated profits from a business which is contemplated but not established are too remote and speculative to furnish a basis for the award of damages. Loss of profits can be considered . . . only when the business has been in existence and has a profit history.

UIH's compensatory damage proof consisted of exactly the kind of lost profit evidence which these courts rejected. Mr. Jones' study simply assumed future profit streams from financial statements prepared at a time when Wharf Cable had no operations. (Add. at 176-90, 601-19) To make matters worse, the district court excluded Wharf's proffered evidence of Wharf Cable's actual performance. (Aplt. App. at 7218-22, 1546-48) That offer showed that the cable system's actual performance was far worse than that assumed by Mr. Jones. For example, the number of actual cable subscribers proved to be less than one-third of the number of subscribers assumed by UIH; Wharf Cable's accumulated *losses* through 1996 were actually $206,000,000 whereas UIH assumed they would be only $84,000,000. As a result, UIH's compensatory damage award of $67,000,000 rests on pure fantasy. In the context of UIH's reliance on purely speculative assumptions, the district

court's exclusion of Wharf Cable's actual performance history was plainly prejudicial.

The district court compounded its errors by barring Wharf's proffered mitigation evidence and refusing to instruct the jury on mitigation. (Aplt. App. at 9223, 1546-48, 1510-12, 1540, 1283-85, 1320-22) A plaintiff's duty to mitigate its damages is long-settled Colorado law. A party injured by a breach of contract has a duty to make reasonable efforts to reduce the damages sustained. *Hoehne Ditch Co. v. John Flood Ditch Co.*, 76 Colo. 500, 508, 233 P. 167, 170 (1925). In this case, the duty of mitigation required the court to reduce UIH's damages by the return UIH earned on the funds which it was, by its own allegations, prevented from investing in the cable system. On UIH's theory of the case, UIH was left with $50,000,000 plus in funds which it would have invested in CNCL had it been permitted to exercise its option. UIH plainly earned and is continuing to earn some return on these funds and that return should have been deducted from the profit which UIH claims it would have made on its investment in CNCL because UIH has received that return. As the Seventh Circuit put the point in *Fishman v. Estate of Wirtz*, 807 F.2d 520, 558 (7th Cir. 1986),

> some reasonable amount must be charged against plaintiffs' recovery as the opportunity cost of equity to represent the return which may reasonably be imputed to IBI or its shareholders from investments made as alternatives to investment in the Bulls.

Accordingly, the district court's damages awards should be vacated for failure to require mitigation.

X. THE PUNITIVE DAMAGES AWARDED SHOULD BE VACATED OR REDUCED

The jury awarded $58,500,000 in punitive damages despite the fact that UIH's alleged out-of-pocket loss was approximately $900,000. That award is reversible on no less than five separate grounds.

First, punitive damages cannot exceed the amount of compensatory damages awarded on UIH's fraud or breach of fiduciary duty claims under Colorado law. Colo. Rev. Stat. § 13-21-102(1)(a). UIH's compensatory damage award based on those claims must be vacated because: (1) they are barred by the Economic Loss Rule; (2) the loss of an unenforceable contractual opportunity does not constitute the "injury" necessary for a tort recovery; and (3) UIH failed to introduce evidence of the value of its option. Vacatur of UIH's awards on those claims requires vacatur of the punitive damage award.

Second, under Colorado law, UIH must prove that the wrong complained of is attended by circumstances of fraud, malice, or willful and wanton conduct, Colo. Rev. Stat. § 13-21-102(1)(a), and UIH must prove those facts beyond a reasonable doubt. Colo. Rev. Stat. § 13-25-127(2); *see Alley v. Gubser Dev. Co.*, 785 F.2d 849, 855-56 (10th Cir. 1986); *Juarez v. United Farm Tools, Inc.*, 798 F.2d 1341, 1342 (10th Cir. 1986). The Colorado courts have held that to justify an award of punitive damages, the defendant must be found to have acted "with an evil intent, and with the purpose of injuring the plaintiff, or with such a wanton and reckless disregard of his rights as evidence a wrongful motive". *Tri-Aspen Constr. Co. v. Johnson*, 714 P.2d 484, 486 (Colo. 1986) (en banc) (citation and internal quotation marks omitted). The sufficiency of the evidence to meet this standard is a question of law. *Juarez*, 798 F.2d at 1343. Punitive damages may not be awarded for negligence. *Tri-Aspen*, 714 P.2d at 488.

UIH's evidence cannot support a punitive damage award. Even accepting all that UIH claims to have proven, the evidence would establish only that Wharf did not promptly advise UIH of its intention not to proceed with the transaction under negotiation. The undisputed evidence also establishes that Wharf was at all times willing to compensate UIH for its services. Therefore, the most that can be said for UIH's evidence is that Wharf and UIH disagreed about whether the parties' relations had matured to contractual obligation.

It cannot reasonably be said that Wharf purposefully injured UIH. *Tri-Aspen*, 714 P.2d at 486. The loss of a contractual opportunity is not an injury which can support punitive damages. Nor can Wharf be reasonably found to have proceeded in wanton disregard of UIH's rights, since Wharf was willing to compensate UIH for its services. Wharf's refusal to accept UIH's assertions of contractual entitlement is not conduct which can be punished by punitive damages.

Third, UIH failed to prove its entitlement to punitive damages beyond a reasonable doubt. UIH's punitive damages claim depended on the jury's acceptance of UIH's side of a conflict in oral testimony concerning the October 8, 1992 meeting. UIH's oral testimony was contradicted not only by Mr. Ng's testimony but also by the documentary history of the negotiations which was inconsistent with UIH's oral option claim. Given that conflict in the evidence, it cannot be said that UIH proved its claim beyond a reasonable doubt.

Fourth, UIH's punitive damage award is inconsistent with Colorado legislation which directs the court to reduce or disallow exemplary damages to the extent that

> (a) The deterrent effect of the damages has been accomplished; or (b) The conduct which resulted in the award has ceased; or (c) The purpose of such damages has otherwise been served.

Colo. Rev. Stat. § 13-21-102(2)(a)-(c)

Each of these statutory criteria for the disallowance of punitive damages is unquestionably satisfied by the facts of this case. This case involved a unique situation—a one-time association for a single project. This is not a case involving repetitive behavior. There was no evidence which could justify any finding as to Wharf's conduct going beyond the particular situation involved in this case.

The $67,000,000 in compensatory damages in a case involving an outlay of approximately $900,000 provides more than sufficient deterrence in itself. The Colorado Supreme

Court has recognized that a "compensatory damages award . . . also performs the secondary function of discouraging a repetition of [the defendant's] wrongful conduct . . . ." *Kirk v. Denver Pub. Co.*, 818 P.2d 262, 265 (Colo. 1991) (en banc) (citation and internal quotation marks omitted).

Fifth, the award of punitive damages conflicts with the limitations imposed by the Supreme Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 116 S. Ct. 1589 (1996). In *Gore*, the Court limited state punitive damage awards based on culpability of the conduct, the fines levied on comparable conduct and the ratio of punitive to compensatory damages. The award in this case fails all three tests: (1) Wharf's conduct involved no more than a disagreement with UIH's highly debatable contractual assertions; (2) the maximum fine under the Colorado Securities Act is $750,000 (Colo. Rev. Stat. §§ 11-51-603, 18-1-105); and (3) the punitive damages are 65 times the amount expended by UIH. On these facts, the award of $58,500,000 in punitive damages in a case involving no more than $900,000 violates the limitations laid down in *Gore*.

XI. THE AWARD OF PREJUDGMENT INTEREST SHOULD BE VACATED

The district court erred in allowing UIH $28,208,440 in prejudgment interest in addition to compensatory damages of $67,000,000. Under Colorado law, prejudgment interest cannot be awarded on future profits:

> (a) *When money or property has been wrongfully withheld*, interest shall be an amount which fully recognizes the gain or benefit realized by the person withholding such money or property from the date of wrongful withholding to the date of payment or to the date judgment is entered, whichever first occurs; or, at the election of the claimant, (b) Interest shall be at the rate of eight percent per annum compounded annually *for all moneys or the value of all property after they are wrongfully withheld or after they*

> *become due* to the date of payment or to the date judgment is entered, whichever first occurs.

Colo. Rev. Stat. § 5-12-102(1)(a) (emphasis added). Colorado cases have made it plain that prejudgment interest can be awarded only for past losses and not for a right to future income. "The plain language of this statute indicates . . . that prejudgment interest is allowed only as to past losses". *Shannon v. Colorado Sch. of Mines*, 847 P.2d 210, 213 (Colo. Ct. App. 1992); *see also Coale v. Dow Chem. Co.*, 701 P.2d 885, 890 (Colo. Ct. App. 1985); *Life Care Centers of Am., Inc. v. East Hampden Assocs. Ltd. Partnership*, 903 P.2d 1180, 1189-90 (Colo. Ct. App. 1995).

The theory of UIH's claim is inconsistent with the award of prejudgment interest on the facts of this case. UIH claimed that it was deprived of a right to invest its moneys, not of a right to receive moneys. Had UIH done what it claims it was prevented from doing, it would have paid over in excess of $50,000,000, rather than receiving anything. The drafts of shareholder agreements imposed restrictions on UIH's ability to sell its stock in CNCL. (Add. at 64-119, 205-57, 258-310, 340-92) Wharf Cable was a start-up venture which was projected to generate losses for some years. Wharf Cable's experience proved to be even worse than expected, accumulating losses of $206,000,000 through 1996. (Aplt. App. at 1546-48) Far from generating income or dividends, Wharf Cable has required continuing investment. On these facts, the award of prejudgment interest is wholly inappropriate because no "money or property has been wrongfully withheld" from UIH. Accordingly, the district court's award of $28,208,440 in prejudgment interest should be vacated.

CONCLUSION

For the foregoing reasons, Appellants respectfully request that the Court vacate the judgment below and dismiss the case as to all defendants.

STATEMENT REGARDING ORAL ARGUMENT

Appellants believe that oral argument would assist the Court in its understanding of the many issues in this case.

Respectfully submitted,

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